IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-533

In re the Marriage of ANGELA
and JESS H. HISQUIERDO.

JESS H. HISQUIERDO,

Respondent,

vs.

ANGELA HISQUIERDO,

Appellant.

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF CALIFORNIA

JAMES D. ENDMAN

311 South Spring Street
Suite 1116
Los Angeles, CA 90013
(213) 687-0704

Attorney for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. _____

In re the Marriage of ANGELA
and JESS H. HISQUIERDO.

JESS H. HISQUIERDO,

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INDEX

TABLE OF CASES CITED

STATUTES CITED

IN THE SUPREME COURT

OF THE UNITED STATES

No. _____

JESS H. HISQUIERDO,

Petitioner,

v.

ANGELA HISQUIERDO

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Jess H. Hisquierdo, hereby petitions for a writ of certiorari to review the decision of the Supreme Court of the State of California holding that Petitioner's future entitle-

ment to Federal Railroad Retirement Benefits as provided under 45 USC 231, et seq., is community property and subject to division upon the dissolution of marriage.

OPINIONS BELOW

The opinion below on the original decision is reported at 19 C.3d 613, 139 Cal. Rptr. 590, 566 P.2d 224. It is appended hereto as Appendix A.

JURISDICTION

The order sought to be reviewed was made and entered on July 12, 1977. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 USC 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether there is any property, community or otherwise, right

to the entitlement of Federal Railroad Retirement benefits.

2. Whether a spouse divorced from an employee, who works in a railroad connected occupation, is entitled to any benefits under the Railroad Retirement Act.

3. Whether the purpose of the Railroad Retirement Act precludes a divorced spouse from any entitlement to a portion of her ex-husband's future benefits.

STATEMENT OF CASE

The parties herein had been married 13 years and 10 months. Petitioner had been engaged in railroad connected employment prior to, during, and subsequent to his marriage and had accumulated future benefits under the Railroad Retirement Act. His wife was also

employed and had accumulated benefits under the Social Security Act.

The trial court held at the interlocutory hearing that there was no community property interest to Petitioner's rights to future Railroad Retirement benefits. The intermediate State appellate court affirmed, but the California Supreme Court reversed the trial court's decision.

The federal question raised, initially at the trial level, was as follows:

Whether the Congessional intent in establishing the right to Railroad Retirement benefits is violated by awarding a divorced spouse a community property interest in her ex-husband's rights to those benefits.

The California Supreme Court

held no such violation.

The California Supreme Court also failed to hold that the social security insurance program established under the Social Security Act is similar to that of the Railroad Retirement Act, and thereby held that there existed a property right to the Railroad Retirement benefits.

POINT I

THERE IS NO PROPERTY RIGHT, COMMUNITY OR OTHERWISE, TO THE FUTURE ENTITLEMENT OF FEDERAL RAILROAD RETIREMENT ACT BENEFITS

This Court in discussing Social Security benefits held that "an expectations of public benefits does not confer a contractural right." Richardson v. Belcher, 404 U.S. 78, 80-81, 92 S. Ct. 254 (1971).

This Court, further, described

social security system as a "social insurance" program whereby those who are presently gainfully employed are taxed in order to pay benefits to those who are currently retired. Fleming v. Nestor, 363 U. S. 603, 609-610, 80 S. Ct. 1367 (1960).

As to Railroad Retirement benefits, the same effect has been held, that the rights thereunder are statutory and that there are no contractural rights thereto. Ruhl v. Railroad Retirement Board, 342 F.2d 662; cert. denied 382 U. S. 836, 86 S. Ct. 81 (1965).

Pension rights in California are a community asset to the extent they represent "an element of her husband's contractural compensation and is earned by performance of services." Benson v. City of Los Angeles, 60 C.2d 355, 359,

33 Cal. Rptr. 257, 384 P.2d 649 (1963).

It therefore follows that since there can be no contractural elements of deferred compensation to the Railroad Retirement benefits, there are no community property rights thereto.

In all the cases that counsel herein has read, in which a retirement benefit was held to be community property, there existed a relationship of employee and employer under which the benefits were conferred.

POINT II

THE SPOUSE DIVORCED FROM AN EMPLOYEE, WHO IS EMPLOYED IN A RAILROAD CONNECTED OCCUPATION, IS NOT ENTITLED TO ANY BENEFITS UNDER THE RAILROAD RETIREMENT ACT

Congress in enacting the Railroad Retirement Act, specifically provided that a divorced spouse's rights are

terminated. 45 USC 231d(c)(3)(B). To hold that the divorced spouse is still entitled to a portion of the ex-spouse's benefits interferes with the specific intent of Congress that any such entitlement is terminated when the parties are absolutely divorced.

In Wissner v. Wissner, 338 U. S. 655 (1950) this Court held that where the federal law and state law conflict, the state law must yield. Congress has not only expressed its intent as to the termination of rights of a divorced spouse, but has also stated that the railroad connected employee's benefits cannot be assigned or in any way anticipated. 45 USC 231m. Thus the federal law must prevail to the effect that there are no community property rights to the

railroad connected employee's benefits.

It was just on such a principle that the State of Texas, the only other state to this counsel's knowledge to rule on this issue, decided that there were no community property rights to Railroad Retirement benefits. Allen v. Allen,(Texas), 363 S. W.2d 312 (1962).

POINT III

THE PURPOSE OF THE RAILROAD RETIREMENT ACT PRECLUDES A DIVORCED SPOUSE FROM ANY ENTITLEMENT TO HER EX-HUSBAND'S FUTURE BENEFITS

When the Railroad Retirement Act was first enacted in 1937, there were few, if any, provisions for the retirement of workers. Those who could no longer work were merely discarded. The purpose of the Railroad Retirement Act, and its counterpart the Social Security Act, was to provide those who had provided

a minimum number of employed quarters, a retirement income. To take away as much as half of that retirement income will defeat the Congressional purpose. It may prevent, in many cases, the ability of those who have reached the age of retirement from being able to retire andwe will be back to where we were before the enactment of the legislation. By this conclusion, counsel does not mean to imply that the divorced spouse should be left destitute. The trial courts have the right to rely on retirement income to determine the ability of the recipient to pay spousal support (alimony). Thus, the division could be meted out with judicial discretion based on ability and need and not arbitrarily by some precomputed formula.

As an example, in the within

case, Petitioner's ex-wife will have all of her social security on which to rely on her retirement, In re Marriage of Nizenkoff, 65 C. A.3d 136 (1977), and, if the within case rule is not reversed, also a substantial portion of the Petitioner's railroad retirement. While Petitioner will have less than the full sum of his retirement on which to rely after he has reached his retirement years.

CONCLUSION

This Court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,

JAMES D. ENDMAN
Attorney for
Petitioner

APPENDIX A - OPINION OF THE SUPREME COURT OF CALIFORNIA

C O P Y

SUPREME COURT
FILED
JUL 12 1977
G.E.BISHEL, Clerk

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re the Marriage of ANGELA and JESS H. HISQUIERDO. JESS H. HISQUIERDO, Respondent, v. ANGELA HISQUIERDO, Appellant.	L.A.30712 (Super. Ct. No. D860954

We are called upon to decide whether benefits afforded by the Railroad Retirement Act (45 U.S.C. § 231 et seq.) are community property.[1/]

Jess and Angela Hisquierdo were married in 1958 and separated in 1972. Wife was employed throughout the period of the marriage; they had no children. At the

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1/ The Railroad Retirement Act of 1937 (45 U.S.C. § 228a et seq.) was completely revised and amended by the Railroad Retirement Act of 1974, cited above. All references in this opinion are to the later enactment.

time of the dissolution of marriage hearing in 1975, she was 53 years old and husband was 55. He had been employed by the Atchison, Topeka & Santa Fe Railroad from 1942 to 1975, and thereafter by the Los Angeles Union Passenger Terminal. Both of these employments entitle him to retirement benefits under the act when he reaches the age of 60.

In January 1975, husband filed a petition for dissolution of the marriage. The trial court's interlocutory judgment divided the community property by awarding him the residence of the parties, in which there was an equity of $12,828, and furniture and fixtures which had a value of $500. Wife was awarded $100 in a mutual fund, and a 1965 automobile. In order to equalize distribution, husband was ordered to pay wife $6,364, plus interest, in monthly installments. The court refused to grant wife any interest in husband's railroad retirement benefits, or the equivalent thereof, on the ground that she had no community interest in those funds. Wife appeals, contending that the retirement benefits which accrued to husband

during the 13 years of marriage constitute community property, and that the trial court erred in refusing to award her one-half of such benefits.

The United States Supreme Court in Wissner v. Wissner (1950) 338 U.S. 655, held that California's community property law could not be applied to the proceeds of a policy for National Service Life Insurance, claimed by a widow who was not the beneficiary of the policy, because Congress had made it plain, by providing for the insured serviceman's right to change the beneficiary, that the proceeds belong to the beneficiary designated by the insured. In California, retirement benefits resulting from employment during marriage are community property, subject to division in the event of dissolution of the marriage. (Waite v. Waite (1972) 6 Cal.3d 461, 470 (overruled on other grounds in In re Marriage of Brown (1976) 15 Cal.3d 838, 851, fn. 14).) Several recent decisions have held that pension rights created under federal law constitute community property to the extent that they are attributable to employment

during marriage. (E.g., In re Marriage of Fithian (1974) 10 Cal.3d 592; In re Marriage of Smith (1976) 56 Cal.App.3d 247; Bensing v. Bensing (1972) 25 Cal.App.3d 889; In re Marriage of Karlin (1972) 24 Cal.App.3d 25; but see In re Marriage of Brown (1976) 15 Cal.3d 838, 851, fn. 14.)

The principle that has emerged from these decisions is that whenever there is a conflict between a federal statute affording annuity or insurance benefits and state community property laws the federal statute must prevail. However, if the intent of Congress in creating the federal right is not violated by application of California's community property laws, then the status of such rights is governed by California law. (See, e.g., Fithian, 10 Cal.3d at p. 598; In re Marriage of Milhan (1974) 13 Cal.3d 129, 132.) Our task, then, is to determine whether Congress intended that railroad retirement benefits remain the separate property of the employee.

Husband relies upon various provisions of the act as indicating an intent by Congress to render annuities payable

thereunder the separate property of the spouse whose employment is covered by the act. He first quotes the following provision contained in section 231m: "Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated . . . ." (Italics added.)

This provision, with the exception of the clause italicized, is substantially similar to other statutes placing federal and state retirement or insurance benefits beyond the grasp of creditors. (E.g., 10 U.S.C. § 1440 (military annuities); 38 U.S.C. § 3101 (veteran's benefits); Gov. Code, § 21201 (retirement annuities for state employees).) Such statutes do not prevent a pension from being treated as community property, for as was said in Phillipson v. Board of Administration (1970) 3 Cal.3d 32, 44, "Plaintiff [wife] . . . claims not as a creditor, but as an

owner with a 'present, existing, and equal interest.' [Citations omitted.] The recognition of an ownership claim cannot be described as the levy of execution, garnishment, attachment or assignment of property."2/

The prohibition against anticipation of payment of railroad retirement benefits

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2/ Wissner relies upon an exemption clause prohibiting the "seizure" of proceeds of National Service Life Insurance as justification for its conclusion that the designated beneficiary of the policy may not be compelled to pay one-half of the proceeds to the widow as her share of the community property. As we read Wissner, this determination was based upon the court's conclusion that to allow the widow to "capture" the proceeds would frustrate Congress' intent to assure that the serviceman had the right to designate the recipient of the insurance. (338 U.S. at p. 661.) In a number of cases, despite the existence of creditor exemption statutes similar to the one involved here (10 U.S.C. § 1440), California has treated federal annuities as community property (e.g., Fithian; In re Marriage of Smith, supra, 56 Cal.App.3d 247; Bensing v. Bensing, supra, 25 Cal.App.3d 889; In re Marriage of Karlin, supra, 24 Cal.App.3d 25.) In Fithian the United States Supreme Court denied certiorari. (421 U.S. 976.)

in section 231m does not alter this conclusion. The purpose of that provision is to assure that railroad annuities not yet paid to the beneficiary are exempt from the claims of creditors. The clause is the functional equivalent of the prohibition against attachment of veteran's benefits "either before or after receipt by the beneficiary" (38 U.S.C. § 3101(a)), and was not designed to alter the essential purpose of section 231m, i.e., to bar creditors of the beneficiary from reaching annuity payments, rather than to prevent a spouse from vindicating her ownership interest in the pension.

Husband next asserts that the act provides a spouse (or widow/widower) with a right to benefits which are separate and distinct from the benefits accorded to the railroad employee, and that the intent of Congress in granting separate benefits would be frustrated by treating the employee's pension as community property. He points to provisions of the act which grant a separate annuity to a spouse who reaches a certain age and meets other qualifications. (45 U.S.C. § 231a(c)(1)

and (3).) The spouse's annuity terminates upon divorce. (45 U.S.C. § 231d(c)(3)(B).)[3/] A widow or widower is also entitled to an annuity. (45 U.S.C. § 231a(d)(1)(i).)

In circumstances in which the surviving spouse of a deceased employee is entitled to a separate annuity, our holding in Fithian provides the answer. There, in reply to an assertion of the husband that Congress did not intend a military retirement pension to constitute community property because it had created an annuity plan for widows but not ex-wives, we stated, "The point is not persuasive. Congress' concern for the welfare of soldiers' widows sheds little light on Congress'

3/ Husband mistakenly asserts that a congressional intent to terminate a divorced spouse's right in the railroad employee's pension is demonstrated by the provision of section 231d(c)(3)(B) that a spouse's entitlement to an annuity shall end upon divorce. However, as the section makes clear, the provision refers not to any interest the spouse may have in the employee's pension but in the separate benefits granted the spouse under the act.

attitude toward the community treatment of retirement benefits, particularly since those benefits do not survive the serviceman regardless of his marital status at death. It is not incongruous for Congress to supply a program to aid widows, who no longer have husbands to provide sustenance, and omit to do so for ex-wives who can rely on state family law concepts of support, alimony, and community property for a source of income." (10 Cal.3d at p. 600.)

The mere fact that distinct benefits are provided by the act for the retired employee and his spouse (or widow/widower) does not indicate an intention that the employee's annuity should be separate property. To accede to such proposition would imply Contress intended that although a spouse is entitled to both a separate annuity and the support of the railroad employee during marriage, both of these benefits are withdrawn upon divorce. It seems unlikely that Congress proposed to leave a divorced spouse without any assistance whatever stemming from the employee's entitlement to a pension

during marriage. Rather, as in Fithian, the fact that Congress made no provision for a former spouse in the act is more rationally explained by its reliance upon state property law to protect an ex-wife's interest in the railroad employee's annuity.

Husband also contends that railroad retirement benefits under the act are similar in many respects to National Service Life Insurance proceeds and that, therefore, his annuity should, like the insurance proceeds in Wissner, be held to constitute his separate property. But, as we note above, the fundamental premise of Wissner was that Congress intended a serviceman to have an absolute right to change his beneficiary and that to require the designated beneficiary to pay over the proceeds of the policy to the widow would frustrate that intent. Husband does not point to any similar provision in the railroad retirement act. In any event, as we held in In re Marriage of Milhan, supra, 13 Cal. 3d 129, 133, Wissner does not prohibit a court from evaluating the community interest in a military life policy and awarding the wife of the insured spouse an

equivalent amount in other property available for distribution.

Nor are we persuaded by husband's analogy to benefits payable under the Social Security Act. (42 U.S.C. § 401 et seq.) He claims that the right to railroad retirement pensions is a statutory right granted by Congress, not a contractual benefit awarded for services rendered and that, therefore, his pension does not constitute community property. He declares that the act is in many respects similar to the Social Security Act, that the two pension systems are coordinated with one another, that social security annuities have been held to be statutory rather than contractual in nature (Flemming v. Nestor (1960) 363 U.S. 603, 611), and therefore a similar result must follow with respect to railroad retirement pensions.

The foregoing proposition is unsupported by authority. Although there are some similarities between social security benefits and railroad retirement pensions, the same may be said regarding military

retirement pensions which we held in Fithian and its progeny to constitute community property. Thus, we are not convinced by husband's argument.

Finally, husband relies upon a Texas case which holds that in a divorce action a wife may not be awarded a portion of her husband's railroad retirement pension when such benefits are not due until some future date. (Allen v. Allen (Tex.Civ. App. 1962) 383 S.W.2d 312.) We do not find Allen persuasive for all the reasons discussed herein. (Compare In re Marriage of Brown, supra, 15 Cal.3d 838, 851.)

The judgment is reversed and the cause is remanded to the trial court for disposition of property in a manner consistent with this opinion.

MOSK, J.

WE CONCUR:

BIRD, C.J.
TOBRINER, J.
CLARK, J.
RICHARDSON, J.
MANUEL, J.
*SULLIVAN, J.

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-533

JESS H. HISQUIERDO,

Petitioner,

vs.

ANGELA HISQUIERDO

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CALIFORNIA

PETITION FOR CERTIORARI FILED OCT. 7, 1977

CERTIORARI GRANTED APRIL 24, 1978

APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. 77-533

JESS H. HISQUIERDO,
Petitioner,
vs.
ANGELA HISQUIERDO

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CALIFORNIA

PETITION FOR CERTIORARI FILED OCT. 7, 1977
CERTIORARI GRANTED APRIL 24, 1978

INDEX TO APPENDIX

LIST OF DOCKET ENTRIES

Name, Address and Telephone Number of Attorney(s)

JAMES D. ENDMAN
311 S. Spring St., Suite 1116
Los Angeles, Calif. 90013
(213) 687-[illegible]

Attorney(s) for Petitioner

Space Below for Use of Court Clerk Only

ORIGINAL
JAN 9 1975

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

In re the marriage of

Petitioner: JESS H. HISQUIERDO

and

Respondent: ANGELA HISQUIERDO

CASE NUMBER

D860954

PETITION (MARRIAGE)

1. This petition is for:

☐ Legal separation of the parties pursuant to:
- ☐ Civil Code Section 4506(1)
- ☐ Civil Code Section 4506(2)

☒ Dissolution of the marriage pursuant to:
- ☒ Civil Code Section 4506(1)
- ☐ Civil Code Section 4506(2)

Petitioner has been a resident of this state for at least six months and of this county for at least
(Petitioner/Respondent)
three months immediately preceding the filing of this petition.

☐ Nullity of the marriage pursuant to:
- ☐ Civil Code Section 4400
- ☐ Civil Code Section 4401
- ☐ Civil Code Section 4425( )

2. Statistical information:

a. Husband's social security number 554-14-9241 Wife's social security number: unk.

b. Date and place of marriage: September, 1953, Las Vegas, Nevada

c. Date of separation: July, 1972 The number of years from date of marriage to date of separation is: 13 years, 10 months, ... days.

d. There are no children of this marriage including the following minor children:
(Number)

Name	Birthdate	Age	Sex
None			

3. Property statement:

☐ There is no property subject to disposition by the court in this proceeding.

☐ All property otherwise subject to disposition by the court in this proceeding has been disposed of by written agreement of the parties.

☒ The following described property is subject to disposition by the court in this proceeding.

1. Real property: 9526 Poinciana St., Pico Rivera, Calif.
2. Automobile: 1965 Ford Fairlane 500, lic. no. unk.

4. Petition requests that the following described property be confirmed as petitioner's separate property:

5. Petitioner requests that:

a ☐ Custody of children be awarded ..... (Petitioner/Respondent/Other [Specify])

b. ☐ Support of children be awarded

c. ☒ Spousal support not (not) be awarded Respondent (Petitioner/Respondent)

d. ☒ Property rights be determined as provided by law

e. ☒ Attorney's fees and costs not (not) be awarded Respondent (Petitioner/Respondent)

and that the court inquire into the status of the marriage and render such judgments and make such injunctive or other orders as are appropriate.

Petitioner declares under penalty of perjury that the foregoing including any attachments, is true and correct and that this declaration was executed on ..... at Los Angeles, California.

..... (Signature)

James D. Endman (Attorney for Petitioner)

Jess H. Hisquierdo (Type/print name)

A declaration under penalty of perjury must be executed within California. An affidavit is required if executed outside California.

Name, Address and Telephone Number of Attorney (s)	Space Below for Use of Court Clerk Only
BENNETT AND ALCARAZ 1545 Wilshire Boulevard Suite 711 Los Angeles, California 90017 TEL; 484-0540 Attorney(s) for Respondent	

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

In re the marriage of	CASE NUMBER
Petitioner: JESS H. BISQUIERDO and Respondent: ANGELA BISQUIERDO	D 860954 RESPONSE (MARRIAGE)

3.

1. This response is for:

☒ Reconciliation of the parties

☐ Legal separation of the parties pursuant to:
- ☐ Civil Code Section 4506(1)
- ☐ Civil Code Section 4506(2)

☐ Dissolution of the marriage pursuant to:
- ☐ Civil Code Section 4506(1)
- ☐ Civil Code Section 4506(2)

.....has been a resident of this state for at least six months and of this county for at least
(Petitioner/Respondent)
three months immediately preceding the filing of this petition.

☐ Nullity of the marriage pursuant to:
- ☐ Civil Code Section 4400
- ☐ Civil Code Section 4401
- ☐ Civil Code Section 4425( )

2. The statistical information in the petition is correct (If incorrect, complete the following)
(correct/incorrect)

a. Husband's social security number:..... Wife's social security number:.....
b. Date and place of marriage:.....

c. Date of separation:..... The number of years from date of marriage to date of separation is:.....years,.....months,.....days.
d. There are.....children of this marriage including the following minor children:
(Number)

Name	Birthdate	Age	Sex

3. The property statement in the petition is incorrect (If incorrect, complete the following)
(correct/incorrect)

☐ There is no property subject to disposition by the court in this proceeding.

☐ All property otherwise subject to disposition by the court in this proceeding has been disposed of by written agreement of the parties.

☒ The following described property is subject to disposition by the court in this proceeding:

1) Railroad retirement and pension fund

2) Stocks and Bonds

3) Cash in bank - savings and checking accounts

4) Life Insurance policies on life of JESS M. HISQUIERDO

4. The statement in the petition of separate property to be confirmed by the court in this proceeding is.....
(correct/incorrect)

Respondent requests that the following described property be confirmed as respondent's separate property:

None.

5. Respondent requests that:

a. ☐ Custody of children be awarded:.....
(Petitioner/Respondent/Other [Specify])

b. ☐ Support of children be awarded

c. ☒ Spousal support.....-.....be awarded.....respondent.....
(not) (Petitioner/Respondent)

d. ☒ Property rights be determined as provided by law

e. ☐ Attorney's fees and costs.....-.....be awarded.....respondent.....
(not) (Petitioner/Respondent)

and that the court inquire into the status of the marriage and render such judgments and make such injunctive or other orders as are appropriate.

Respondent declares under penalty of perjury that the foregoing, including any attachments, is true and correct and that this declaration was executed on.....at Los Angeles, California.

BENNETT AND ALCARAZ
(Attorney for Respondent)

/s/ ANGELA HISQUIERDO (Signature)
ANGELA HISQUIERDO (Type/print name)

A declaration under penalty of perjury must be executed within California. An affidavit is required if executed outside California.

Name, Address and Telephone Number of Attorney(s)

JAMES D. ENDMAN
311 S. Spring St., Suite 1116
Los Angeles, Calif. 90013
(213) 687-0740

Attorney(s) for Petitioner

Space Below for Use of Court Clerk Only

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

In re the marriage of

Petitioner: JESS H. HISQUIERDO
and
Respondent: ANGELA HISQUIERDO

CASE NUMBER

D 860 954

INTERLOCUTORY JUDGMENT OF DISSOLUTION OF MARRIAGE

This proceeding was heard on July 9, 1975 (Date) before the Honorable JOHN LESLIE GODDARD,

Department No. 66.

The court acquired jurisdiction of the respondent on Jan. 15, 1975 (Date) by:

☐ Service of process on that date, respondent not having appeared within the time permitted by law.

☒ Service of process on that date and respondent having appeared.

☐ Respondent on that date having appeared.

The court orders that an interiocutory judgment be entered declaring that the parties are entitled to have their marriage dissolved. This interlocutory judgment does not constitute a final dissolution of marriage and the parties are still married and will be, and neither party may remarry, until a final judgment of dissolution is entered.

The court also orders that, unless both parties file their consent to a dismissal of this proceeding, a final judgment of dissolution be entered upon proper application of either party or on the court's own motion after the expiration of at least six months from the date the court acquired jurisdiction of the respondent. The final judgment shall include such other and further relief as may be necessary to a complete disposition of this proceeding, but entry of the final judgment shall not deprive this court of its jurisdiction over any matter expressly reserved to it in this or the final judgment until a final disposition is made of each such matter.

THE COURT FURTHER ORDERS that:

The following items of community property are awarded to Petitioner as his sole and separate property: the family residence located at 9526 Poinciana Street, Pico Rivera, California, and more particularly described as follows: Lot 134 of Tract 17540 as per map recorded in Book 470 Pages 7 and 8 of Maps, in the Office of the County Recorder of Los Angeles County, California; with an equity of $12,828.00; the furniture and furnishings located in the family residence with a value of $500.00.

(continued)

(continued)

Respondent is awarded the following items of community property as her sole and separate property: the ISI Growth Mutual Fund, valued at $100.00; the 1965 Ford Fairlane 500 automobile (license number unknown).

The Court further orders that in order to equalize the distribution of community property, the Petitioner shall pay to Respondent $6,364.00 payable as follows: $64.00 payable on September 1, 1975 and the balance of $6,300 payable amortized at 7% interest $100.77 per month on the first day of each month beginning October 1, 1975 and to continue for a period of six and one-half years (6½), said sums are declared a judicial lien in favor of the Respondent upon the real property described hereinabove until said sum is paid in full.

The Court finds that there is no community interest in Petitioner's railroad retirement fund, or in Respondent's social security benefits.

The Court further orders that the Petitioner shall pay to Respondent's attorney the sum of $500 as attorney's fees and $96.00 court costs, payable at the rate of $50 per month, beginning with October 1, 1975 and continuing on the first day of each month thereafter until paid in full.

Dated: _____

_____
JOHN LESLIE GODDARD,
Judge Pro Tem of the
Superior Court

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977
No. 77-533

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JESS H. HISQUIERDO,

Petitioner,

vs.

ANGELA HISQUIERDO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR RESPONDENT IN OPPOSITION

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(213) 489-2205

Attorney for Respondent

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977
No. 77-533

In re the Marriage of ANGELA and JESS H. HISQUIERDO.

JESS H. HISQUIERDO,

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR RESPONDENT IN OPPOSITION

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624 South Grand Avenue
Suite 2620
Los Angeles, California 90017
(213) 489-2205

Attorney for Respondent

INDEX

TABLE OF CASES CITED

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Petitioner,

v.

ANGELA HISQUIERDO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF CALIFORNIA

BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTION

Respondent does not question the jurisdiction set forth in the petition.

QUESTIONS PRESENTED

The questions raised by petitioner are incorrectly phrased. The sole question for review is: Has the California Supreme Court frustrated any congressional intent by categorizing United States Railroad Retirement Act benefits as a community property asset pursuant to the community property laws of the State of California?

STATEMENT OF THE CASE

Petitioner's statement of the case is incorrect. The question at the trial level was simply whether Railroad Retirement benefits constitute a community property asset. The question on appeal was whether

the recognition of a community interest in Railroad Retirement benefits frustrates any congressional intent. The California Supreme Court did not render any decision concerning social security benefits because that issue was not raised by the husband, petitioner herein.

POINT I

THE CALIFORNIA SUPREME COURT IS THE FINAL ARBITER CONCERNING INTERPRETATION OF ITS COMMUNITY PROPERTY LAWS WHERE THERE IS NO CONFLICT WITH FEDERAL LAW.

The first point raised by petitioner is that there is no property right to the future entitlement of Federal Railroad Retirement Act benefits and therefore the California Supreme Court should not have held there is a community interest in Railroad Retirement Act benefits.

Petitioner argues that because the right to Railroad Retirement benefits is statutory, 45 U.S.C., Section 231 et seq., they are not contractual rights, and because they are not contractual rights, there can be no community property rights in such benefits. For this proposition petitioner cites a 1963 California Court of Appeal case in which the court stated that pension rights constitute an element of contractual compensation and, therefore, are earned by the performance of services. Petitioner argues that because Railroad Retirement benefits are not based on a contract, such benefits cannot be community property.

By the Petition for Writ of Certiorari, petitioner is attempting to have this court interpret California

Community Property Laws. The California Supreme Court has never stated that a contractual right is necessary to recognize a community interest in any retirement benefit. In fact, the California appellate courts have held that pension benefits pursuant to both federal and state statutes are community property to the extent that they are attributable to employment during marriage, In re Marriage of Fithian, 10 Cal.3d 592, 111 Cal.Rptr. 369, In re Marriage of Smith, 56 Cal.App.3d 247, 128 Cal.Rptr. 410, Bensing v. Bensing, 25 Cal.App. 889, 102 Cal.Rptr. 255, In re Marriage of Karlin, 24 Cal.App.3d 25, 101 Cal. Rptr. 240, Phillipson v. Board of Administration, 3 Cal.3d 32, 89 Cal.Rptr. 68.

The state courts are the final arbiters of the meaning and appropriate

application of the state statutes subject only to review by the United States Supreme Court if such construction or application is appropriately challenged on constitutional grounds, Beal v. Missouri Pac. R.R. Corp., 312 U.S. 45, 61 S. Ct. 418. A corollary to this rule is that when questions of property law which may involve a conflict between a state court decision and federal statutes, the Supremacy Clause of the United States Constitution requires a state law to yield no matter how clearly the subject matter otherwise falls within a state's acknowledged sphere of power, Free v. Bland, 369 U.S. 664, 82 S.Ct. 398. The question of whether a contractual right, a statutory right or no right at all is required for property to be considered community property is for

the California courts to decide. In this regard, the California Supreme Court has already ruled.

POINT II

THE CALIFORNIA SUPREME COURT HAS NOT VIOLATED ANY FEDERAL STATUTE NOR FRUSTRATED ANY CONGRESSIONAL INTENT BY ITS DECISION REPORTED AT 9 Cal.3d 613, 139 Cal.Rptr. 590.

The Supreme Court of California did not award respondent any part of petitioner's Railroad Retirement benefits. What the court did was hold that the petitioner's railroad retirement benefits are community property and that the case of Wissner v. Wissner, 338 U.S. 655 does not prohibit a California court from evaluating a community interest in an asset, and thereafter awarding a spouse an equivalent amount of other property available for distribution.

Wissner does not forbid the states from applying their community property laws to achieve an equitable division of marital property, so long as the operation of those laws does not frustrate congressional intent., In re Marriage of Milhan, 13 Cal.3d 129, 132 117 Cal.Rptr. 810. The California courts have always recognized the principle that if the intent of Congress in creating a federal right is not violated by application of California's community property laws, then the status of such rights is governed by California law, In re Marriage of Fithian, 10 Cal.3d 592, 111 Cal.Rptr. 359.

In Point III of petitioner's Petition, on pages 9 through 11, petitioner argues that the purpose of

the Railroad Retirement Act precludes a divorced spouse from any entitlement to her ex-husband's future benefits. He argues that to take away as much as half of that retirement income guaranteed by the railroad retirement act will defeat the congressional purpose of providing retirement income to railroad workers.

As is discussed above, the California Supreme Court decision does not mean that a California court will award one half of all future benefits to a divorced spouse. All that is required under California community property laws is that the property acquired during the marriage be distributed equally upon dissolution of the marriage. California Civil Code Section 4800, et seq.

One of the ways in which equal division can be accomplished is to grant one spouse all of an asset and award the other spouse another asset of equal value.

The California Supreme Court dealt with each of petitioner's arguments concerning frustration of congressional intent on pages 5 through 10 of the opinion which was appended to petitioner's petition as Appendix A. The California Supreme Court determined therein that a consideration of Railroad Retirement benefits as a community property asset does not violate any federal statute nor the intent of Congress. The Court pointed out that although a spouse's annuity terminates on divorce, and a widow or widower is entitled to an annuity, that the fact that Congress made no provision for a

former spouse in the Railroad Retirement Act might be rationally explained by Congress' reliance upon state property law to protect an ex-wife's interest in the railroad employee's annuity.

In Point II of the petition, petitioner argues that Congress in enacting the railroad retirement act, specifically provided that the divorced spouse's rights are terminated, 45 USC 231 d(c)(3)(B), and to hold that a divorced spouse is still entitled to a portion of the ex-spouse's benefits interferes with the specific intent of Congress that any such entitlement is terminated when the parties are absolutely divorced.

This agrument is entirely misleading. The only right which is terminated

upon divorce is the spouse's right to a spouse's annuity, under that statute cited by petitioner. That statute has nothing to do with the railroader's own pension.

CONCLUSION

By its decision, the California Supreme Court did not call upon the California trial courts to make any determination that would effect the husband's right to receive his retirement benefits pursuant to the United States Railroad Retirement Act. By recognizing a community property interest in the husband's retirement benefits, the court merely interpreted the community property laws of California in order to effect an equal division of the assets upon dissolution

of a marriage. No federal statutes are violated by the California Supreme Court ruling, nor is any expressed or implied intent of Congress frustrated.

Respectfully submitted,

BENNETT AND FIELDS

BY 
RAY C. BENNETT
Attorney for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-533

JESS H. HISQUIERDO,

Petitioner

v.

ANGELA HISQUIERDO

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF CALIFORNIA

BRIEF OF PETITIONER

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INDEX

TABLE OF CASES CITED

STATUTES CITED

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OF THE UNITED STATES

October Term, 1977

No. 77-533

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Petitioner

v.

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BRIEF OF PETITIONER

OPINION BELOW

The opinion below on the original decision is reported at 19 C.3d 613, 139 Cal. Rptr. 590, 566 P.2d 224.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3), on the ground that California's statutes dealing with division of community

property upon divorce is repugnant to those rights set up under the Railroad Retirement Act.

The order reviewed herein was made and entered on July 12, 1977. The petition for writ of certiorari was filed on November 11, 1977. This Court granted certiorari on April 24, 1978.

STATUTORY PROVISIONS INVOLVED

(a) California Civil Code § 687: "Community property is property acquired by husband and wife, during marriage, when not acquired as the separate property of either."

(b) California Civil Code § 4800: "...the court shall, either in its interlocutory judgment of dissolution of the marriage ... divide the community property and the quasi-community property of the parties ... equally."

(c) 45 U.S.C. § 231m: "Notwithstanding any other law of the United States, or of any state, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment or other legal process under any circumstances whatsoever, nor shall payment thereof be anticipated."

(d) 45 U.S.C. § 231d(c)(3)(B): "The entitlement of a spouse of an individual to an annuity under section 231a (c) of this title shall end on the last day of the month preceding the month in which ... the spouse and the individual are absolutely divorced..."

QUESTIONS PRESENTED FOR REVIEW

1. Whether there is any property, community or otherwise, right to the future entitlement of Federal Railroad

Retirement benefits.

2. Whether a spouse divorced from an employee of a railroad connected occupation is entitled to any benefits under the Railroad Retirement Act.

3. Whether the purpose of the Railroad Retirement Act precludes a divorced spouse from any entitlement to a portion of the railroad connected ex-spouses future benefits.

STATEMENT OF THE CASE

The parties to this matter were married in 1958 and separated in 1972. Both of the parties were employed throughout their marriage. Petitioner, Husband, was employed in a railroad connected occupation, and may be entitled to benefits under the Railroad Retirement Act upon reaching the eligible age set forth in 45 U.S.C. § 231(a). At the same

time the Wife will be entitled to Social Security benefits arising by reason of her employment.

In the case below, Wife contended that she was entitled to share in her Husband's future Railroad Retirement benefits. The trial court held that there was no such entitlement on her part. The California District Court of Appeals affirmed, but the California Supreme Court reversed.

Petition for writ of certiorari was filed before this Court and on April 24, 1978 this Court granted certiorari.

SUMMARY OF ARGUMENT

I. THERE IS NO PROPERTY RIGHT TO THE FEDERAL RAILROAD RETIREMENT ACT BENEFITS.

Where the state courts incorrectly adjudge a federal right, this Court can

review the error.

It is well settled in California, that any community property rights to a pension benefit arises solely by reason of there being a contractural right thereto. Both with respect to social security benefits and with respect to railroad retirement benefits there can be no contractural rights. These "social insurance" or "welfare" benefits are purely a creation of statute. The state courts, therefore, have no right to deal with such benefits as if they were community property rights.

II. A SPOUSE DIVORCED FROM AN EMPLOYEE OF A RAILROAD CONNECTED OCCUPATION IS NOT ENTITLED TO ANY BENEFITS UNDER THE RAILROAD RETIREMENT ACT.

The Court has spoken with clarity, that where there is a conflict between

the federal law and the state law, the state law must yield.

The Railroad Retirement Act establishes the rights not only for the individual, who has worked in a railroad connected occupation, but also for the spouse and widow or widower. The Act is also specific that the rights of a divorced spouse are terminated. To hold that under state law a divorced spouses rights are not terminated, but that a spouse is still entitled to some portion of the employed spouses rights is in clear conflict with the federal law, and the state law must yield.

III. THE PURPOSE OF THE RAILROAD RETIREMENT ACT PRECLUDES A DIVORCED SPOUSE FROM ANY ENTITLEMENT TO ANY PORTION OF THE RAILROAD EMPLOYED SPOUSES FUTURE BENEFITS.

The purpose of the Railroad Retirement Act was to do away with the

frequency of the tragic sequence of old age, disability, loss of earning power, destitution, and dependency on charity. To allow a divorced spouse the right to a portion of the ex-spouses annuity, runs contrary to the express intent of Congress to terminate any annuity upon divorce and frustrates the purpose of the Act to do away with the tragic sequence herein set forth.

ARGUMENT

INTRODUCTION

The trial court below correctly held that there were no community property rights to Petitioner's future entitlement to railroad retirement benefits. The California Supreme Court, however, incorrectly adjudged the federal rights to be community property and in so doing has failed to recognize

that where the federal law and state law conflict, the state law is the one that must yield.

POINT I

THERE IS NO PROPERTY RIGHT, COMMUNITY OR OTHERWISE, TO THE FUTURE ENTITLEMENT OF FEDERAL RAILROAD RETIREMENT ACT BENEFITS.

During a proceeding for the dissolution of marriage (divorce), the trial court is obligated to divide the community property equally. California Civil Code § 4800. Community property is defined by California Civil Code § 687 to be "that property acquired by husband and wife, during marriage, when not acquired as the separate property of either."

The California Supreme Court has found some pension benefits to be community property. When it has done

so, its opinion has been based on the fact that the "right to receive a pension ... is an element of her husband's contractural compensation and is earned by performance of services." Benson v. City of Los Angeles (1963) 60 C.2d 355, 359, 33 Cal. Rptr. 257, 384 P.2d 649.

The California Supreme Court has also found that pension benefits represent a form of deferred compensation for services rendered and therefore are a "contractural right, derived from the terms of the employment contract." Based on such contractural right, such benefits are a form of property. In re Marriage of Brown (1976) 15 C.3d 838.

"It is now well settled in this State (California) that in order to qualify as a divisible community asset,

an interest must be a contractural right or a property right. A pension right becomes a property interest when the employer cannot unilaterally repudiate the right." In re Marriage of Nizenkoff (1976) 65 C.A.3d 136, 135 Cal. Rptr. 189

Just as the social security tax is imposed on the payroll of employees (26 U.S.C. § 3101), so is the railroad tax imposed on railway connected employees (26 U.S.C. § 3201). The proceeds of the tax are paid to the United States Treasury. Each year an amount equal to the benefits, that are expected to be paid out, is appropriated to a Trust Fund. 45 U.S.C. §§ 231f, 231n; Fleming v. Nestor (1960) 363 U.S. 603, 609, 80 S. Ct. 1367. Thus, neither the social security system nor the railroad retirement sustem contain any contractur-

al elements.

This Court described the social security system as a method of "social insurance" whereby those who are presently employed are taxed in order to pay the benefits to those who are currently retired or disabled. The right is purely statutory. There is no constractural interest. Fleming v. Nestor, supra, pp. 609-610.

The rights under the Railroad Retirement Act are likewise purely statutory with no contractural elements attributable thereto. Ruhl v. Railroad Retirement Board, 342 F.2d 662; certiorari denied 382 U.S. 836, 86 S. Ct. 81 (1965).

While this Court does not have the power to review errors of state law, it does have the power to review state

judgment "to the extent that they incorrectly adjudge federal rights." Herb v. Pitcairn (1944) 324 U.S. 117, 126.

In Richardson v. Belcher (1971) 404 U.S. 78, 880-81, this Court stated with respect to social security benefits that an expectation of public benefits does not confer a contractural right. (see also Weinberger v. Wiesenfeld (1974) 420 U.S. 636, 646)

Based on the foregoing reasoning, the rule of law in California is, that there being no contractural rights to social security benefits, there is no community property rights. In re Marriage of Nizenkoff, supra. Yet, misconstruing the federal benefits created under the Railroad Retirement Act, the California Supreme Court held

that there are community property rights to such benefits.

POINT II

A SPOUSE DIVORCED FROM AN EMPLOYEE OF A RAILROAD CONNECTED OCCUPATION IS NOT ENTITLED TO ANY BENEFITS UNDER THE RAILROAD RETIREMENT ACT.

Whenever there is a conflict between federal law and state law, the state law must yield. Wissner v. Wissner (1950) 338 U.S. 655.

Wissner itself arose out of a California case in which the widow sought to assert community property rights to a National Service Life Insurance (NSLI) policy. Congress expressed its intent that the NSLI insured shall have the right to designate the beneficiary. The Court also held that the California judgment

is deficient in that it would divert the future payments as soon as they are paid, since such is in flat conflict with the exemtion provision, to wit, the payments "shall be exempt from claims of creditors, and shall not be liable to attachment, levy, seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary..." (38 U.S.C. 816)

Similar provisions are found in the Railroad Retirement Act. The rights of the individual, spouse and widow or widower are all set forth with clarity under the Act. (45 U.S.C. §§ 231 et seq.) Additionally, the Act is quite clear that the divorced spouse has no rights to an annuity. (45 U.S.C. 231d(c)(3)(B)). Congress,

therefore, has created all rights, both during and after the marriage. To allow the spouse an ownership interest in the annuity payments, or an interest of equal value in other assets owned by the parties, upon divorce would be a diversion of the future payments in direct conflict with the exemption provision set out in 45 U.S.C. §231m.

Furthermore, any holding that there exists a community property ownership interest to the railroad connected employee's annuity, after the spouses annuity has been lost by an absolute divorce, is in direct conflict with the federal law, and such determination of a community interest must yield.

POINT III

THE PURPOSE OF THE RAILROAD RETIREMENT ACT PRECLUDES A DIVORCED SPOUSE FROM ANY

ENTITLEMENT TO ANY PORTION OF THE EMPLOYED SPOUSES FUTURE BENEFITS.

It must not be forgotten that when the Railroad Retirement Act was first enacted in 1935, and its counterpart the Social Security Act, this Country had ample opportunity to observe the "frequency of the tragic sequence of old age, disability, loss of earning power, destitution and dependency on public or private charity." The purpose of the Act has as its foundation "to avert the personal hazards and social problems which often attend old age." 70 Am. Jur.2d 716-717.

The purpose of the Act is to not only improve the relationship between employers and employees, but also to allow employees to be able to retire with peace of mind and physical comfort.

Retirement System for Employees of Carriers Subject to Interstate Commerce Act. H.R. Rep. No. 1711, 74th Cong., 1st Sess. (1935).

Congress in enacting the Railroad Retirement Act specifically provided for benefits to the individuals, their spouses and widows and widowers. 45 U.S.C. 231a, 231c.

Congress also made it clear, that as to the divorced spouse, any entitlement to an annuity shall terminate when the spouse and the railroad connected employee are absolutely divorced. 45 U.S.C. 231d(c)(3)(B).

To allow the community property system to take away as much as half of the retiring employee's income upon divorce is to destroy the very purpose for which the Act was passed and runs

contrary to the expressed intent of Congress. The rising cost of living due to our present inflation already places many of our senior citizens on the mere subsistence level when they receive their full benefits. To take away as much as half of those benefits is to reduce our divorced elderly population below the subsistence level. The result is a return to the destitution, despair and dependency on charity and its accompanying loss of self-esteem. Clearly to allow such to happen is in direct contravention to the intent of Congress.

By the foregoing argument, it is not the within counsel's intent to imply that the divorced spouse should be left destitute. To the contrary, the trial courts will always have the right to rely on the financial resources, inclu-

ding the railroad retirement annuity, to determine the ability of the individual to pay spousal support (alimony) to the divorced spouse. Thus, the division could be meted out with judicial discretion based on ability and need and not arbitrarily by a precomputed formula based on the length of marriage and railroad connected service.

As an example, the Petitioner's wife, will have all of her social security benefits (based on In re Marriage of Nizenkoff, supra) and a substantial portion of Petitioner's railroad retirement benefits. Whereas, the Petitioner will be left with less than the full sum of his retirement annuity. The inequity and frustration of the Congressional intent is obvious.

SUMMARY

To allow the ccmmunity property states to impress an ownership right to railroad connected employees' benefits upon divorce, despite the loss of all rights thereto upon absolute divorce, runs contrary to the federal law and the law set forth by this Court. More importantly, to allow such will also in effect destroy the very purpose for which the Act was created.

CONCLUSION

THIS COURT SHOULD REVERSE THE JUDGMENT BELOW RENDERED BY THE CALIFORNIA SUPREME COURT, AND AFFIRM THE JUDGMENT RENDERED BY THE TRIAL COURT.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

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vs.

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Respondent.

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TO THE SUPREME COURT OF CALIFORNIA

RESPONDENT'S BRIEF

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TOPICAL INDEX

TOPICAL INDEX
(continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

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SUPREME COURT
OF THE UNITED STATES

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No. 77-533

In re the Marriage of ANGELA
and JESS H. HISQUIERDO

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

RESPONDENT'S BRIEF

QUESTION PRESENTED:

The questions for review as phrased by petitioner beg the real issue in the case. The issue is whether by treating railroad retirement benefits as community property upon the dissolution of marriage, California has encroached upon any over-riding federal interest, contravened any expressed congressional intent, or interfered with any federal power.

SUMMARY OF ARGUMENT

California treats retirement benefits as community property upon dissolution of a marriage. Under California law, the courts evaluate the community interest in the benefits whether or not the spouse has any vested right in the pension, whether an employee is receiving pension benefits or

will receive them many years in the future, and even where there is a possibility that a spouse may lose a right to receive the benefits. All pensions and retirement benefits have been treated as community property with the exception of social security benefits. A California Court of Appeal has held otherwise with respect to social security benefits.

This case involves railroad retirement benefits which are funded solely by the railroads and the employees themselves on an equal basis. A railroader's contributions to the federally administered system are deducted from his salary. No federal money is involved in funding the retirement benefits.

The Railroad Retirement Act of 1974, 88 Stat. 1305, 45 U.S.C. (Supp.V) 231-231t, and its predecessor evidence no intent which bears on the issue in this case.

Recent Social Security Act amendments do not involve the issue in this case except to the extent that Congress has become receptive to the plight of older divorced women.

The fact that the Railroad Retirement Act does not provide benefits to divorced spouses does not indicate any intent of Congress that divorced spouses of railroaders cannot rely on state family law concepts to protect their rights. Congress has expressed no such intent and none should be implied, especially where the state domestic relations law does not interfere with the federal scheme.

Before the preemption doctrine can be applied, there must be a conflict between state and federal law, and state law must yield only where state law stands as an obstacle to the accomplishment and execution of the full purposes and

objectives of Congress. To reverse the California decision requires this court to find a purpose of Congress to ignore the security of divorced wives of railroaders. No such intent has ever been expressed by Congress. Furthermore, the California decision does not in any way interfere with the administration of the Railroad Retirement Act.

ARGUMENT

I. A PRESUMPTION EXISTS THAT FEDERAL LAW SHOULD NOT PREEMPT STATE DOMESTIC RELATIONS LAW. FOR THE STATE LAW TO YIELD, THE STATE LAW MUST BE INIMICAL TO FEDERAL OBJECTIVES.

The area of domestic relations law is within the exclusive powers of the state. As was stated by Justice Holmes

in State of Ohio ex rel. Popovici v. Agler, 280 U.S. 379 at 383, "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the state and not to the laws of the United States." The power to make rules to establish, protect and strengthen family life as well as to regulate the disposition of property is committed by the Constitution to the states, Labine v. Vincent, 401 U.S. 532 at 539. It is submitted that this Court, with these principles in mind, in construing the statutes at issue herein must do so with the presumption that Congress did not intend to interfere with state domestic relations law.

The policy of federal non-interference with state domestic relations law means that a federal court does not construe a federal statute to preempt a state statute and an intent of Congress should not be

presumed unless "positively required by direct enactment," Wetmore v. Markoe 196 U.S. 68, 77, or, in otherwords, "unless that was the clear and manifest purpose of Congress." Ray v. Atlantic Richfield Co., 46 U.S.L.W. 4200.

As was stated by this court in United States v. Yazell, 382 U.S. 341, 352, state property interest "should be overriden by federal courts only where clear and substantial interest of the national government, which cannot be served consistently with respect for such state interest, will suffer major damage if state law is applied." No interest of the national government will suffer damage if the California decision is affirmed.

In determining whether or not the California decision conflicts with any federal purpose, this court must determine whether Congress has explicitly or

implicitly prohibited the states from taking that course of action which has been followed by the California Supreme Court. Respondent submits that no such intent can be perceived with respect to the Railroad Retirement Act.

As stated by this court in Rice v. Santa Fe Elevator Corp., 331 U.S. 218 at 230:

> "The [Congressional] purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. [Citations omitted] or the act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement as the state laws of the same subject. Hines v. Davidowitz, 312 U.S. 52. Likewise, the object sought to be obtained by the federal law in character of obligations imposed by it may reveal the same purpose [citations omitted]."

"Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found 'where compliance with both federal and state regulation is a physical impossibility. . .'" Ray, supra, 46 U.S.L.W. 4200, 4201-4202, citing Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, or where the "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Ray, supra, citing Hines v. Davidowitz, 312 U.S. 52.

However, it must be kept in mind that as stated by this court, a conflict between federal and state statute will not be implied when none clearly exits. Huron Portland Cement Co. v. City of Detroit,

362 U.S. 813 at 446.

II. WISSNER V. WISSNER, AND FREE V. BLAND, INVOLVED A CONFLICT BETWEEN STATE COMMUNITY PROPERTY LAW AND CLEARLY EXPRESSED FEDERAL PURPOSES EMBODIED IN FEDERAL STATUTES PROMULGATED PURSUANT TO EXCLUSIVELY FEDERAL POWERS WHILE THIS CASE DOES NOT.

It is only through federal preemption pursuant to the supremacy clause of the Constitution that this Court has preempted state family law concepts. The primary case cited by petitioner and the United States for the point that the California decision must be reversed is Wissner v. Wissner, 338 U.S. 655. Also cited is Free v. Bland, 369 U.S. 663. Neither

of these cases support petitioner's contentions. Both cases stand for the point that where state family law concepts interfere with the clearly expressed intent of Congress in enacting legislation bearing on a national power, where the intent of Congress is directly impeded by state law, the state law must yield.

In Wissner the husband enlisted in the army in November, 1942 and in January, 1943, subscribed to a National Service Life Insurance policy, the premiums of which were paid out of the serviceman's salary. As pointed out by this Court, the National Life Insurance Act was a Congressional mode of affording an uniform and comprehensive system of life insurance for members and veterens of the armed forces of the United States, A liberal policy towards the serviceman and his named beneficiary was everywhere evident in the comprehensive

statutory plan.

The controlling section of the Act provided that the insured "shall have the right to designate the beneficiary or beneficiaries of the insurance [within a designated class], . . and shall . . . at all times have the right to change the beneficiary or beneficiaries. . ." 38 U.S.C. §802(g). "Thus Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other." Wissner, supra, at 658.

The National Life Insurance Act provided that the payments to the benficiary should be exempt from the claims of creditors and not be subject to attachment, levy, or siezure by legal or equitable process, 38 U.S.C. §454. This Court suggested that whether the judgment was directed at the very money

received from the government or an equivalent amount, the judgment which ordered the diversion of future payments as they are paid by the government to the serviceman's mother nullified the soldier's choice to designate his beneficiary and frustrated the clearly expressed intent of Congress.

It is significant to note that in Wissner, the act of Congress, which was entirely clear in setting forth the policy that the serviceman should have the absolute right to designate the beneficiary, was promulgated pursuant to the war power of Congress, a federal power delegated solely to Congress, a power the states cannot interfere with.

In Free v. Bland, supra, this court was called upon to determine whether or not treasury regulations creating a right of survivorship in U.S. Savings Bonds preempted any inconsistant Texas community

property laws. The relevant statute, 31 U.S.C. §757C(a), provided that when either co-owner of the bond dies, the survivor will be recognized as the sole and absolute owner. 31 C.F.R.§315.61. Mr. and Mrs. Free purchased U.S. Savings Bonds and after Mrs. Free died, a controversy arose between the husband who claimed exclusive ownership by operation of the treasury regulations, and the son who was the principal beneficiary under Mrs. Free's will claiming an interest in the bonds by virtue of the state community property laws.

This Court held that there was a conflict between the federal law and the state law and the state law had to yield. It is significant to note that the treasury regulations were promulgated pursuant to Article I, §8, Clause 2, of the Constitution which delegates to the

federal government the power "[t]o borrow Money on the credit of the United States." This court noted that the clear purpose of the treasury regulations was to confer the right of survivorship on the surviving co-owner. The federal law was entirely clear in stating "the survivor will be recognized as the sole and absolute owner."

Again, Free v. Bland involved the situation where state community property was held to conflict with federal law promulgated pursuant to a solely federal power, that being the power to borrow money on the credit of the United States. The success of the management of the national debt was deemed to depend on the successful sale of savings bonds and the survivorship provisions afforded a convenient method of avoiding complicated probate proceedings, 369 U.S. at 669.

The Railroad Retirement Act, however, was promulgated pursuant to the power to regulate interstate commerce, as well as apparently, the power to spend money for the general welfare.[1]

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[1] The Railroad Retirement Act of 1934 was justified on the ground that it promoted efficiency and safety in interstate commerce. The Act was declared unconstitutional by this court in Railroad Retirement Board v. Alton Railroad Company, 295 U.S. 330. Thereafter the 74th Congress introduced new legislation which became the separate Railroad Retirement and Taxing Acts of 1935. The taxing measure and part of the retirement act were declared unconstitutional in Alton Railroad Company v. Railroad Retirement Board, 16 Fed.Supp. 95[illegible]. While the appeal to this court was pending, President Roosevelt met with railroad and labor representatives, changes in the system were agreed upon, and the carriers agreed to drop the litigation and not test the constitutionality of the legislation. A complete history of the Railroad Retirement System through 1972 is discussed in "The Railroad Retirement Systems: Its coming Crisis, Report of the Commission on Railroad Retirement," H.R. Doc. No. 92-350, 92nd Cong. 2d Sess. (1972). This report shows no intent of Congress to preempt state domestic relations law.

The benefits are financed equally by the employers and the employees. Even in the area of interstate commerce, the states may impose legislation which affects interstate commerce as long as the state has not imposed an undue burden on it. See Huron Portland Cement Co. v. City of Detroit, supra.

In Huron Portland Cement, criminal proceedings were instituted against Huron Portland Cement for violations of Detroit pollution laws. The appellant argued that the city ordinance was unconstitutional on the basis that since federal inspection statutes has been complied with, Detroit could not impose additional or inconsistent standards, and secondly, even if Congress had not expressly preempted the field, the municipal ordinance materially affected interstate commerce

where uniformity was necessary.

This Court rejected both arguments and pointed out that to hold otherwise "would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists." 362 U.S. at 446. This court stated that it could not hold that the local pollution regulations so burdened the federal power to regulate interstate commerce as to be constitutionally invalid. Any state regulation based on police power which does not discriminate against interstate commerce or operate to disrupt any required uniformity may constitutionally stand, 362 U.S. at 448.

The decision of the California court places absolutely no burden on interstate commerce. At the very most, it has been

suggested that California attorneys have requested benefit information from the Railroad Retirement Board. This certainly can in no way interfere with the operation of the railroads of this country, and even the United States has admitted that this burden may be reduced as attorneys become familiar with the Railroad Retirement system. At the very least, this decision affects only California and at the most, the other states adhering to community property doctrines.

The policy of non-interference with state domestic relations law where no conflict is present is clear. In United States v. Yazell, supra, a Texas couple obtained a disaster loan from the Small Business Administration. At the time the loan was made, Texas law provided that a married woman could not bind her separate property unless she first obtained a court

decree removing her inability to contract. Mrs. Yazell had not done so. The federal government sought to collect a deficiency of $4,000 on the loan from Mrs. Yazell's separate property. The question before the court was whether or not there was a federal interest in collecting the deficiency from Mrs. Yazell's separate property which warranted this overriding of the Texas law of coverture. This court held that the state rule governed and stated at page 352:

> ". . .Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements. They should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." (Emphasis added.)

In footnote 28 of the Yazell opinion, this Court distinguished Wissner noting that the California court decision in that case was in derogation of the federal statutory policy that soldiers have an absolute right to name the beneficiary of their National Life Insurance.

On page 354, this Court noted that the decisions applying "federal law" to supersede state law typically relate to programs and actions which by their nature are and must be uniform in character throughout the nation. Although the Railroad Retirement Act is uniform throughout the nation in terms of benefits provided, California does not attempt to interfere with the operation of that law, reinterpret that law, or in any way affect the federal law. All the California court decision requires is that the expectation of retirement benefits, which are based on employment

attributable during the marriage be recognized as an asset of the marital community.

III. THE LACK OF BENEFITS FOR A DIVORCED SPOUSE UNDER THE RAILROAD RETIREMENT ACT DOES NOT INDICATE AN INTENT OF CONGRESS TO PREEMPT STATE FAMILY LAW CONCEPTS.

Petitioner argues that Congress has made it clear that as to a divorced spouse, any entitlement to an annuity shall terminate when the spouse and the railroad worker are divorced, citing 45 U.S.C. 231d (c)(B). This statute, however, states that a spouse has no right to receive a spouse's benefit, and merely reflects the fact there is no spouse after divorce. That statute does not indicate any intent of Congress that a divorced spouse shall

be left in poverty on the dissolution of a marriage.

The reason for the existence of a spouse's benefit at all is an interesting inquiry in itself, and leads respondent to the conclusion that the enactment of legislation authorizing a spouse's benefit had nothing to do with Congress' concern for divorced spouses.

No spouse's benefit existed under the Railroad Retirement Act until 1951. Although benefits payable under the Railroad Retirement Act have traditionally been larger than social security benefits, in 1950 social security benefits were raised so significantly that pressure was put on Congress to increase Railroad Retirement benefits. One of the major changes in the 1951 amendments to the Railroad Retirement Act in increasing

the benefit structure was the introduction of the spouses benefit, H.R. Doc. No. 92-350, 92d Cong. 2d Sess. p. 61 (1972). As indicated in this report, a dominant feature of the Railroad Retirement Act since 1935 has been the continual increase in benefits, and especially the desire to maintain a higher level of benefits than available under the Social Security Act.

The United States points out that although Congress has established certain benefits for divorced wives and widows under the Social Security Act, citing 42 U.S.C. (and Supp.V) 402(b)(1), it has not provided equivalent benefits under the Railroad Retirement Act, (Am.Br. 17-18). Without citing any authority, the United States argues that this decision appears to reflect a determination that the sources of the Railroad Retirement

Fund should not be expended for divorced wives. There is no authority for this point. No such evidence appears anywhere in published reports.

The 1966 testimony of the Chairman of the Railroad Retirement Board (Am.Br. 16-17) does little more than indicate an intent of that gentleman, not Congress, that a divorced wife should not be entitled to death benefits, but that such benefits should go to the railroader's children. There is a great distinction, however, between benefits to be received during the railroader's life and benefits awarded after death. This testimony furnishes no aid in determining intent of Congress with regard to the issue at hand.

IV. THE GARNISHMENT STATUTES IN THE RAILROAD RETIREMENT AND SOCIAL SECURITY ACTS DO NOT INDICATE THAT CONGRESS INTENDED TO PROHIBIT APPLICATION OF STATE FAMILY LAW PRINCIPLES TO RAILROAD RETIREMENT BENEFITS.

A) Respondent Does Not Claim an Interest in her Husband's Benefits as a Creditor.

Petitioner argues that the decision of the California Supreme Court conflicts with 45 U.S.C. §231m, the exemption from execution statute (Pet.Br.16) That statute reads in relevant part:

> "Notwithstanding any other law of the United States, or of any state territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any

> "circumstances whatsoever, nor shall the payment thereof be anticipated. . ."

Petitioner's argument assumes that respondent claims an interest as a creditor. She does not. There is no history as to the purpose of that statute other than to insure "that no annuity payments shall be assignable or shall be subject to any tax or legal process," H.R. Rep. No. 1711, 74th Cong., 1st Sess., at 12 (1935). The obvious purpose is to insulate retirement income from the grasp of creditors. The exemption statute protects the railroader and his spouse during the marriage. It would be ironic if that statute can be applied against the spouse after marriage.

The California decision does not place respondent in the same position as a creditor. While a spouse attempting to

garnish retirement benefits to satisfy as alimony obligations can be considered a creditor, a spouse with a community property interest does not claim an interest as a creditor but as an "owner with a present, existing, and equal interest." Phillipson v. Board of Administration, 3 Cal.3d 32, 44.

Community property is that which is acquired by husband and wife or either during marriage which is not the separate property of either, California Civil Code §687. The respective interests are present existing and equal interests, California Civil Code §5105. One theory behind community property is that the marriage "is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution,"

Myer v. Kinzer 12 Cal. 247, 251-252.

One commentator has viewed the rights of a nonemployee spouse in retirement benefits as arising "from the fundamental principle of community property law that both spouses participate in the community and both are entitled to share in its rewards." Note, Dividing the Community Property Interests in Nonvested Pension Rights, 65 Cal.L.Rev. 275, 279 (1977).

California courts have consistently found community property interests in retirement benefits whether based on contractual rights, or on state statute (Phillipson v. Board of Administration, supra) or federal statute. California courts have found a community property interest in federal military retirement benefits, In re Marriage of Fithian, 10 Cal.3d 592, and in a federal civil servant's retirement pension, In re

Marriage of Peterson, 41 Cal.App.3d 642, California does not require a vested right to receive the benefits, In re Marriage of Brown, 15 Cal.3d 126. Therefore, the issue of property or contractual rights of respondent is irrelevant.

It is significant that in Wissner, the wife could be viewed more as a creditor than the respondent could ever by in this case. In September, 1943, the serviceman expressed the wish that he could "find some way of forcing [his estranged wife] to a settlement and a divorce." Wissner, id., at 657. In Wissner, the premiums for the policy were paid out of earnings of the husband while separated. If Wissner were to be tried in California today, a court would be compelled to find that the premiums were paid for with separate property earnings, Civil Code §5118, and the wife would have no claim under any

circumstances. In the case at issue, respondent, however, does not claim an interest in the retirement benefits as a creditor but as a partner in the marital community.

B) Social Security Act Amendments Pertaining to Garnishment of Federal Monies Have No Bearing on this Case.

The United States suggests that Congress has struck a balance between the claims of retired railroaders and their spouses by enactment of Section 459 of the Social Security Act, 42 U.S.C. (Supp.V) 659, (Am.Br. 18-19). The 1974 amendment of this section permitted garnishment of monies due from or payable by the United States to satisfy a child support or alimony payment.

This amendment was not an attempt to strike a balance between railroaders

and divorced spouses. It was an attempt to force an end to the rapid and uncontrolled growth of families on the nation's welfare rolls, S.Rep. No. 93-1356, 93d Cong., 2d Sess., U.S. Code, Cong. and Adm. News 8148. This Senate Report referred to a Rand Corporation study emphasizing the number of middle class families forced on to welfare because of errant husbands and fathers, including well-to-do physicians and attorneys who were able to escape their obligations because of insufficient mechanisms for enforcement of support orders.

The purpose of the amendments was clearly enunciated in Senate Report No. 93-1356, 93d Cong. 2d Sess. (1974) wherein it was stated:

> "The Committee bill is designed primarily to improve State programs for establishing paternity and collecting support for children getting AFDC payments. The

> Committee recognizes, however, that the problem of non-support is broader than the AFDC rolls and that many families might be able to avoid the necessity of applying for welfare in the first place if they had adequate assistance in obtaining the support due from absent parents. Accordingly, the Committee bill would require that the procedures adopted for locating absent parents, establishing paternity, and collecting child support be made available to families even if they are not on the welfare rolls. (Emphasis added.)
>
> 1974 U.S. Code Cong. & Admin. News at 8158.

As pointed out by the United States, Section 459 was affected by a 1977 amendment to the Social Security Act which states that alimony "does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community proeprty settlement, equitable distribution of property, or other division of property between spouses or former spouses." Pub. L. 95-30, Section 501(d),

91 Stat. 160 to be codified at 42 U.S.C. 662(c).

All this statute does is define the term "alimony". A history of the purpose of the definitional amendment does not disclose any intent that Congress intended to preempt state community property law with respect to railroad retirement benefits. All the statute does is further clarify the intent of Congress that divorced spouses should be able to garnish federal benefits to satisfy support obligations. Community property, however, is not a support obligation.

Senator Nunn, the sponsor of the amendment before the Senate, explained the purpose of the amendment, and in doing so emphasized that the purpose was to increase collection of support payments and decrease the number of families on welfare rolls. His intention was set forth

in the following manner (123 Cong. Rec. S6726 (daily ed., April 29, 1977):

> "In my view, these figures are evidence that this program is beginning to work as Congress intended. The intent of these amendments, that I am introducing today will be to clarify the garnishment provisions, to provide for administrative improvements and to aid in the evaluation of the programs. I feel that these amendments will only add to the efficiency and effectiveness of the program."

No reason appears for the failure to include community property settlement obligations in the definitional amendment. It is possible that Congress intended to recognize an existing property interest of the spouses of pensioners. It is also possible that Congress had no concern for such obligations because it was the ability of husbands to avoid their support

obligations which prompted the amendment of §459 in the first place. A community property settlement obligation, however, is not a support obligation.

V. LEGISLATIVE HISTORY REFLECTS A CONCERN FOR THE PLIGHT OF DIVORCED SPOUSES AND NOT ANY DETERMINATION TO PUNISH THEM.

Petitioner asserts that because Congress has determined that a spouse's benefit under the Railroad Retirement Act terminates upon divorce, Congress has determined that a spouse's interest in her husband's pension to be received by him must be terminated (Pet.Br. 18-19). The United States argues further that the determination not to aid divorced spouses is not to be questioned by the states (Am.Br. 18).

There is no legislative history reflecting any determination of Congress that a spouse in community property states should be precluded from protection under state law. To the contrary, Congress has been receptive to the plight of older divorced women. Legislative history evidences an increasing concern.

In 1965, Congress enacted what is now an amendment to the Social Act codified at 42 U.S.C. §416(d), which provided for a divorced spouse's benefit if she was divorced after twenty years of marriage. Congressional history illustrates the concern for divorced spouses under the Social Security Act noting that it is not uncommon for a marriage to end in divorce after many years when the wife is too old to build up social security earnings, and that even if she is able to find a job, and that under the laws then

existing, a wife's right to benefits based on her husband's earnings ended with divorce, S. Rep. No. 404 84th Cong. 1st Sess. (1965) U.S. Code Cong. & Adm. News, Vol. 1, 84th Cong. p. 2047

In 1977, 42 U.S.C. §416(d) was amended to provide that a divorced wife's benefit is payable if she had been married for ten rather than twenty years, Pub. L. 95-216, 91 §337(c) (December 14, 1977). The House version of the bill proposed that the marriage requirement be reduced to five years, however. In a House Ways and Means Committee report the intent of Congress to aid divorced spouses is everywhere evident, particularly at pages 48-49 wherein it was stated:

> "In 1965, the Congress provided benefits for aged divorced wives and aged surviving divorced wives of retired, disabled, or deceased insured workers, subject to a 20-year duration-of-marriage requirement. In providing these benefits, your committee stated that the purpose of doing so was to:

> . . . provide protection mainly for women who have spent their lives in marriages that are dissolved when they are far along in years--especially housewives who have not been able to work and earn social security benefit protection of their own--from loss of benefit rights through divorce.

Generally speaking, with a period of marriage, considerably shorter than 20 years there is a greater likelihood that a divorced person will either qualify for benefits as a spouse in a second marriage or have earnings and qualify for benefits as a worker under social security. Your committee is concerned, however, that older divorced people married less than 20 years may nevertheless reach old age without any social security protection. Accordingly, your committee's bill would reduce from 20 years to 5 years the length of time a person must have been married to a worker in order for benefits to be payable to an aged divorced spouse or surviving divorced spouse."

H.R. Rep. No. 95-702 Part. I, 95th Cong.2d Sess. 48-49 (1977).

In view of the increasing concern of Congress for divorced spouses, it seems incongruous to argue that Congress, in its

wisdom, intended to prevent the states from applying family law principles to protect a partner in a marriage. No such intent exists and none should be implied. To do so would be to depart from the teaching of this court that it will not seek out conflicts between federal and state law where none exists. Huron Portland Cement, supra, at 446.

The fact that legislative choices are available to subject retirement benefits to community property settlements as pointed out by the United States, (Am.Br. 23) does not indicate that California has contravened existing federal law, especially in light of the fact that the California decision has nothing to do with garnishment.

In Wetmore v. Markoe, supra, a New York court denied a restraining order

to prevent the collection of alimony which a husband contended was discharged in bankruptcy. The husband argued that the enactment of an amendment of bankruptcy law excepting an alimony decree from a discharge was legislative recognition that prior to the amendment, an alimony judgment was discharged. This court rejected that argument and indicated the legislation could be referred to show the legislative trend and it could have been passed to resolve the problem of conflicting decisions.

More importantly, this court noted that unless positively required by a direct enactment of Congress, the court should not presume a design of Congress which would enable a husband to escape his support obligations, 96 U.S. at 77.

VI. WITH LITTLE EVIDENCE OF INTENT OF CONGRESS TO GUIDE THE COURT IT CANNOT BE CONCLUDED THAT THE CALIFORNIA COURT HAS CONTRAVENED ANY FEDERAL PURPOSE.

Petitioner argues that to allow the California decision to stand would in effect destroy the very purpose for which the act was created (Pet.Br. 21). As is shown by the 1935 House of Representative's Hearing Report, H.R. Rept. No. 1711, 74th Cong. 1st Sess. 10 (1935), the purpose of the Act was to permit older railroaders to retire and enjoy the closing days of their lives with peace of mind and physical comfort. To accept petitioner's argument would require the court to conclude that until Congress in 1974 permitted garnishment of the

retirement benefits to satisfy support obligations, a husband and father could divorce his wife and evade his responsibilities with the knowledge that his benefits would be free from garnishment.

The lack of benefits for a divorced spouse as well as the lack of spousal benefits at all until 1951 may reflect nothing more than divorce was a rare occurrence at that time. It would not take any statistical analysis to conclude that the divorce rate in the United States has steadily increased over the years. Although the California decision is not a response to this phenomenon, but rather an extension of California community property law, it would require obtuse reasoning to assume Congress intended to prohibit the states from interpreting federal statutes in a domestic relations

matter in a manner that does not disrupt the federally sponsored and privately financed railroad retirement system.

Petitioner attempts to argue that somehow respondent will reap a windfall if the California decision is not reversed, because respondent will be entitled to social security benefits, although failing to mention that railroad retirement benefits are significantly higher than social security benefits. He has also failed to point out the possibility that he may be entitled to a spouse's benefit based on respondent's social security earnings, Oliver v. Califano, UNEMP. INS. REP. ¶15, 244 (N.D. Cal. 1977).[2]

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[2] In Oliver, the district court found that the differential treatment of male and female divorced spouses, in view of the former statute which required the husband to demonstrate that at least half of his support was derived from his wife in order to be eligible for benefits,

Most significantly, however, this case will have serious repercussions affecting divorced women who are not entitled to social security benefits. Although it is argued that the states are still free to award alimony (Am.Br. 22), in at least one community property state, Texas, alimony cannot be awarded "for the wife after a judgment of divorce has been entered." Francis v. Francis, 412 S.W.2d 29, 39 (Tex. 1967); Vernon's Ann. Tex. Civ. Stat. Art. 232b-1, Sec. 2(6) Art. 2328b-3 Sec. 7. In Texas non-employed spouses of railroader's will be left to depend

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72 U.S.C. §402(c)(1)(C), was a denial of equal protection. Consequently the one-half support requirement has been judicially eliminated so that a divorced husband is now automatically entitled to benefits based on his wife's Social Security covered employment. Oliver, a class action, was not appealed. As of January 1, 1979, the requisite 20-year marriage period will be reduced to ten years. Pub.L. 95-216, §337(c) (December 14, 1977).

solely on public assistance for support after divorce, while the husband will be able to receive a full annuity, in the event the decision is reversed. This would be clearly contrary to the intent of Congress.

CONCLUSION

The California decision does not conflict with federal statutes nor does it cause any interference with the effective operation of the railroad retirement system. To imply an intent on the part of Congress where none exists, would cause an interference with state family law principles and would in itself conflict with Congress' increasing concern for security of older

divorced women. The decision should be affirmed.

Respectfully submitted,

RAY C. BENNETT
Attorney for
Respondent

No. 77-533

In the Supreme Court of the United States

OCTOBER TERM, 1977

JESS H. HISQUIERDO, PETITIONER

v.

ANGELA HISQUIERDO

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

236-215—78——1

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to this Court's invitation of November 28, 1977.

QUESTION PRESENTED

The United States will address the question whether federal law prohibits the states from applying community property rules to a worker's expectation of receiving railroad retirement benefits.

STATEMENT

A. THE RAILROAD RETIREMENT ACT

The Railroad Retirement Act of 1974, 88 Stat. 1305, 45 U.S.C. (Supp. V) 231-231t, provides a system of retirement and disability benefits for persons em-

ployed in the railroad industry. Unlike private retirement systems, which typically are supported by voluntary or contractual contributions made by employees and employers, benefits payable under the Railroad Retirement Act are financed by means of employment taxes. The Internal Revenue Service collects the employment taxes under authority of the Railroad Retirement Tax Act (26 U.S.C. (and Supp. V) 3201 *et seq.*).

To qualify for benefits under the Act, persons must meet the eligibility requirements of 45 U.S.C. (Supp. V) 231a. Subsections (a) and (b) provide primary and supplemental benefits for specified categories of railroad employees, while subsection (c) provides additional benefits to spouses of such persons. In order to qualify for the benefits, a spouse must live with the employee, receive regular contributions from the employee for support, or be entitled to support from the employee under a court order. 45 U.S.C. (Supp. V) 231a(c)(3)(i). Benefits for a spouse terminate, however, when "the spouse and the [employee] are absolutely divorced." 45 U.S.C. (Supp. V) 231d(c)(3)(B).

The Railroad Retirement Act in most respects is modeled on the Social Security Act, 49 Stat. 622, as amended, 42 U.S.C. (and Supp. V) 401 *et seq.*, which it displaces with respect to employment in the railroad industry. Like Social Security benefits, benefits payable under the Railroad Retirement Act are not contractual;[1] they are not part of the considera-

[1] *Ruhl* v. *Railroad Retirement Board*, 342 F. 2d 662, 666 (C.A. 7), certiorari denied, 382 U.S. 836; compare *Flemming* v. *Nestor*, 363 U.S. 603, 608–611; *Weinberger* v. *Salfi*, 422 U.S. 749.

tion earned by an employee and are not considered to be deferred compensation. Moreover, the right to receive a benefit under the Railroad Retirement Act is never "vested," because Congress may modify or withdraw that right at any time, even after an award of an annuity has been made.[2] *Flemming* v. *Nestor,* 363 U.S. 603; *Bernstein* v. *Ribicoff,* 299 F. 2d 248, 251–252 (C.A. 3), certiorari denied, 369 U.S. 887; *Price* v. *Flemming,* 280 F. 2d 956, 959 (C.A. 3). Taxes that were properly collected will not be refunded if the payment schedules change, and there is no exact correspondence between taxes paid by or on behalf of an employee and the benefits to which he may be entitled.

Numerous sections of the Social Security Act are incorporated, either directly or by reference, into the Railroad Retirement Act. The rate of tax now paid by railroad employees to the railroad retirement system equals the rate paid by nonrailroad employees to the social security system. 26 U.S.C. (Supp. V) 3101 and 3201. One component of a person's railroad retirement annuity is computed on the basis of formulas contained in the Social Security Act. Moreover, under minimum guarantee provisions of the Railroad Retirement Act, an annuitant is assured that he will receive benefits under the Act at least as great as he would have received if all of his employment had been subject to the Social Security Act. 45 U.S.C. (Supp. V) 231b.[3]

[2] Congress substantially revised the Railroad Retirement Act in 1974, and it changes benefit schedules frequently.

[3] Under the financial interchange arrangement between the railroad retirement and social security systems, there is a computation

If an employee lacks sufficient railroad compensation and service credits to be eligible for benefits under the Railroad Retirement Act, his credits are transferred to the Social Security Administration, where they are treated as credits under that system. 45 U.S.C. (Supp. V) 231q. In addition, survivor benefits under the Railroad Retirement Act are paid on the basis of an employee's combined railroad retirement and social security employment credits. 45 U.S.C. (Supp. V) 231c. With respect to questions of family relationship, which are of crucial importance in determining entitlement to various benefits payable under the Railroad Retirement Act, many definitions and standards applied under that Act are the same as those applied under the Social Security Act. 45 U.S.C. (Supp. V) 231a(d).

The Railroad Retirement Act provides that railroad retirement annuities are not subject to legal process and cannot be "anticipated" (45 U.S.C. (Supp. V) 231m):

> Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated * * *.

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of the amount of social security benefits which railroad retirement annuitants would have received if their employment had been subject to the Social Security Act. In addition, a computation is made of the amount of taxes under the Federal Insurance Contributions Act that railroad employees would have paid if they were covered by the Social Security Act. A transfer of the difference between those two amounts then is made either to the railroad retirement system or to the social security system, depending on the system in whose favor the difference exists. 45 U.S.C. (Supp. V) 231f(c)(2).

The only exception to the applicability of this rule is stated in Section 459 of the Social Security Act (42 U.S.C. (Supp. V) 659), which permits garnishment of railroad retirement benefits to satisfy an obligation for alimony or child support. A definitional statute added in 1977 provides that alimony "does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses." Pub. L. 95–30, Section 501(d), 91 Stat. 160, to be codified at 42 U.S.C. 662(c).

B. THE PRESENT PROCEEDINGS

Petitioner was employed by the Atchison, Topeka & Santa Fe Railroad from 1942 to 1975 and subsequently by the Los Angeles Union Passenger Terminal. Because those employers are covered by the Railroad Retirement Act, 45 U.S.C. (Supp. V) 231(a)(1), petitioner will become eligible for retirement benefits under the Act at age 60 (Pet. App. 2).

Petitioner and respondent were married in 1958. They separated in 1972, and petitioner filed a petition for dissolution of the marriage in 1975. In an interlocutory decree, the state trial court divided the parties' community property equally between them. The court held, however, that respondent had no interest

in petitioner's expectation of receiving railroad retirement benefits (Pet. App. 1–2). The state court of appeal affirmed, reasoning that the railroad retirement benefits were not contractual and that Section 231m precluded application of state community property laws (133 Cal. Rptr. 684). The court explained that "the federal law is most explicit * * * [and] [t]he interest or right given the *employee* is separate and distinct from that given to the spouse or wife or widow or widower * * *" (133 Cal. Rptr. at 686; emphasis in original).

The Supreme Court of California reversed (Pet. App. 1–12; 19 Cal. 3d 613, 139 Cal. Rptr. 590, 566 P. 2d 224). Starting with the general rule that "[i]n California, retirement benefits resulting from employment during marriage are community property, subject to division in the event of dissolution of the marriage" (Pet. App. 3), the court found no overriding contrary intent of Congress in the provisions of the Railroad Retirement Act. Although the court acknowledged that the Act prohibited assignment or anticipation of benefits, the court determined (Pet. App. 7) that "the essential purpose of section 231m [was] to bar creditors of the beneficiary from reaching annuity payments, rather than to prevent a spouse from vindicating her ownership interest in the pension." The court similarly rejected arguments based on the existence of a separate annuity for spouses (Pet. App. 9–10), finding no evidence that "Congress intended that although a spouse is entitled to both a separate annuity and the support of the railroad employee during

marriage, both of these benefits are withdrawn upon divorce."

DISCUSSION

1. The decision in this case, though grounded in state property law,[4] also raises substantial federal questions regarding construction of the Railroad Retirement Act. Although this Court commonly has no role to play in the development of state community property law, that general rule necessarily gives way where state law conflicts with federal rights. See *Wissner* v. *Wissner,* 338 U.S. 655. *Wissner* held that California could not apply its community property law to insurance proceeds under the National Service Life Insurance Act, 54 Stat. 1008, because "Congress ha[d] spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other" (338 U.S. at 658). The Court explained (*id.* at 659): "Whether directed at the very money received from the Government or an equivalent amount, the judgment below [upholding application of community property law] nullifies the soldier's choice and frustrates the deliberate purpose of Congress. It cannot stand."

The Supreme Court of California recognized in the present case (Pet. App. 4) that "whenever there is a conflict between a federal statute affording annuity

[4] Petitioner apparently contends (Pet. 2–3, 5–7), that the Supreme Court of California misunderstood that State's community property doctrines. But the state court's decision on matters of state law is authoritative (*Herb* v. *Pitcairn*, 324 U.S. 117), and it cannot be reviewed by this Court.

or insurance benefits and state community property laws the federal statute must prevail," but it found no provision in the Railroad Retirement Act creating such a conflict. In our view, that conclusion is incorrect. Congress included in the Act specific provisions regarding payment of benefits to a spouse and regarding assignment or anticipation of an employee's own benefits. Moreover, Congress has manifested a general intent that benefits under the Railroad Retirement Act be equivalent in most respects to benefits under the Social Security Act.

Section 231a(c)(1) of the Railroad Retirement Act provides separate benefits for a qualifying spouse during marriage to a qualifying employee (see pages 2–4, *supra*). The legislative history shows that Congress added this section to the Act, in lieu of increasing benefits for all covered employees, in recognition of the fact that employees supporting spouses as well as themselves had greater needs. At the same time, however, Congress provided that the spouse's benefit was to terminate on divorce, when the employee presumably was again responsible only for himself. 45 U.S.C. (Supp. V) 231d(c)(3)(B). If divorced employees may nevertheless be compelled to pay one-half of their individual benefits (or their equivalent) to former spouses regardless of need, as the California community property law would require, the covered employees would suffer a reduction in benefits that appears to be at odds with the supportive purposes of the Act.

Congress took care in the Act to ensure that an employee's retirement benefits were not readily diminished by other obligations. Section 231m provides that annuities are not "assignable or * * * subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated * * *." In *Wissner* this Court found that diversion of future insurance payments under California community property law would be "in flat conflict" with a comparable (though not identical) provision in the National Service Life Insurance Act. See 338 U.S. at 659. The Supreme Court of California did not discuss this aspect of *Wissner*, and we think that the principles of that case may be controlling.[5]

To be sure, Congress was aware that individual railroad retirement benefits might be used to support former spouses, for the Social Security Act (42 U.S.C. (Supp. V) 659) permits garnishment of benefits to satisfy alimony or child support obligations. However, Congress specified that "alimony" does not include "any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement * * *." Pub. L. 95–30, Section 501(d), 91 Stat. 160, to be codified at 42 U.S.C. 662(c). This clarifying provision strongly indicates that divisions of commu-

[5] The state court wrote that the anti-assignment provision of Section 231m was intended "to bar creditors of the beneficiary from reaching annuity payments, rather than to prevent a spouse from vindicating her ownership interest in the pension" (Pet. App. 7). But this does not come to grips with the essential holding of *Wissner*; under the reasoning of this Court, an anti-assignment provision prevents the spouse from *acquiring* an ownership interest in the prospect of payments.

nity property, which are not based on need and are not affected by the later death or remarriage of a spouse, should not be permitted to reduce an employee's subsistence benefits in the same manner as alimony payments. Where need is established, of course, a divorced spouse in a community property state would be entitled to receive alimony regardless of the division of community assets.

Such a distinction between alimony and community property divisions logically would be more consistent with the nonvested nature of Railroad Retirement benefits. See *Bernstein* v. *Ribicoff, supra.* Moreover, it would bring treatment of Railroad Retirement Act benefits into line with the treatment of Social Security benefits, as Congress by the close relationship between the Acts apparently has intended. See pages 2–4 *supra.* Under California law Social Security benefits are regarded as separate property. *Nizenkoff* v. *Nizenkoff,* 65 Cal. App. 3d 136. Although the Social Security Act does provide benefits for some divorced wives (see 42 U.S.C. (and Supp. V) 402(b)(1)), we do not believe that the absence of such a provision in the Railroad Retirement Act means that Congress intended to subject benefits for all railroad workers to division under state community property laws.

We recognize the possible hardship to divorced spouses that may arise if they are denied a community interest in Railroad Retirement Act benefits. As a general rule, "[i]n California, retirement benefits resulting from employment during marriage are community property, subject to division in the event

of dissolution of the marriage" (Pet. App. 3). Although spouses in genuine need may be supported by alimony payments (and have recourse to garnishment proceedings if necessary), spouses of railroad workers may be at a disadvantage, at least compared to spouses of workers covered by private pension plans. Nevertheless, the Railroad Retirement Act, read in light of the principles set out in *Wissner, supra,* indicates that Congress sought to exclude divorced wives from sharing in railroad retirement benefits through application of state community property law.

2. Although the decision below has created serious administrative problems for the Railroad Retirement Board, it is not presently clear what the long-range consequences of the decision will be.

Since the Supreme Court of California rendered its decision in this case, the Board has been inundated with requests from California attorneys who are involved in marriage dissolution proceedings. These attorneys typically request that the Board provide them with a statement of the "value" of the employee's interest in the railroad retirement system, so that a monetary value may be assigned to the spouse's interest in that community asset. In some cases, the attorneys request a specific item of information, such as the amount of the "contributions" that the employee has paid in support of the retirement system, or the amount of the annuity that would be payable to the employee if he were eligible for a retirement benefit at the present time.

In many instances the Board is unable to provide such information. For example, the Board does not maintain any figure representing the "present value" of a railroad employee's interest in the railroad retirement system; in the Board's view there is no such value, because the benefit schedules are subject to legislative revision. Moreover, because taxes payable under the Railroad Retirement Tax Act are collected by the Internal Revenue Service and not by the Board, the Board cannot even provide a statement of the total taxes that an employee has paid.

The decision in this case also raises questions about how the community property interest of the spouse is to be enforced. Although the Board has at times been joined as a party in marriage dissolution proceedings, under the Railroad Retirement Act the Board is authorized to pay benefits only to persons who satisfy the statutory conditions of eligibility. A divorced spouse is not within that category. Moreover, 45 U.S.C. (Supp. V) 231m limits the power of a state to enforce a community property division by the usual forms of legal process. Although the Supreme Court of California indicated (Pet. App. 10–11) that problems of this sort may be resolved by awarding the spouse an equivalent amount from other community property, that solution, even if permissible (but see *Wissner* v. *Wissner, supra,* 338 U.S. at 659), is possible only when there is enough other property to divide.

It may be, therefore, that the decision in this case will cause significant continuing problems for railroad workers and the Railroad Retirement Board. On the other hand, the administrative burden on the Board may be reduced as California attorneys become more familiar with the workings of the railroad retirement system.

The importance of this decision ultimately depends on the number of person whose benefits it affects.[6] California is the first State to declare that railroad retirement benefits are community property. At present the courts of appeals in Texas are in conflict on the issue. Compare *Allen* v. *Allen,* 363 S.W. 2d 312 (Civ. App.) with *Eichelberger* v. *Eichelberger,* 557 S.W. 2d 587 (Civ. App.). Although the principles that led the Supreme Court of California to conclude that railroad retirement benefits are community property may lead it to the same conclusion about social security and other federal benefits—which would involve far more people than are affected by the railroad retirement system—it has not yet done so and may never do so. Finally, the Supreme Court of California may well reconsider its position in light of the 1977 clarification by Congress of the scope of the "alimony" exception to the anti-assignment of Sec-

[6] The question presented here could arise only in states with community property statutes. No more than six states follow community property rules.

tion 231m; the new statute was not enacted until after this case had been argued in state court.[7]

CONCLUSION

In sum, we believe that the Supreme Court of California erred in holding that federal law permits the State to treat railroad retirement benefits as community property. Because it is too soon to assess the consequences of the decision, however, we do not recommend whether this Court should undertake plenary review.

Respectfully submitted.

WADE H. MCCREE, Jr.,
Solicitor General.

MARCH 1978.

[7] This case was argued on April 5, 1977. Pub. L. 95–30 was signed by the President on May 23, 1977, and the decision of the Supreme Court of California was rendered on July 12, 1977. The parties did not draw Pub. L. 95–30 to the state court's attention, and neither party has relied on it in this Court. Cf. *Massachusetts* v. *Westcott*, 431 U.S. 322 (remanding a case to a state court for further consideration in light of a federal statute not considered by it).

U.S. GOVERNMENT PRINTING OFFICE: 1978

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977
No. 77-533

JESS H. HISQUIERDO,

Petitioner,

vs.

ANGELA HISQUIERDO,

Respondent.

ON PETITION FOR
A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF CALIFORNIA

RESPONDENT'S SUPPLEMENTAL BRIEF

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INDEX

CITATIONS

Cases:

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RESPONDENT'S SUPPLEMENTAL BRIEF

This brief is submitted in response to the brief for the United States as Amicus Curiae.

In his Brief as Amicus Curiae, the Solicitor General concluded that the

Supreme Court of California erred in holding that Federal law permits the state to treat railroad retirement benefits as community property by relying upon Wissner v. Wissner, 338 U.S. 655, and upon his conclusion that Congress intended to exclude divorced wives from sharing in benefits through application of state community property law. This brief is directed to those points.

THE DECISION OF THE CALIFORNIA SUPREME COURT DOES NOT CONFLICT WITH THIS COURT'S DECISION IN WISSNER V. WISSNER.

The Solicitor General has suggested that the principle of Wissner may be controlling in light of 45 U.S.C. 231m which provides that annuities are

not "assignable or . . . subject to any tax or to garnishment, attachment, or to other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated. . . ."

The California Supreme Court noted in its opinion that the fundamental premise of Wissner was that Congress intended a serviceman to have an absolute right to change his beneficiary and that to require the designated beneficiary to pay over the proceeds of the policy to the widow would frustrate congressional intent.

The controlling section of the National Service Life Insurance Act (38 U.S.C. § 701 et. seq.) at issue in Wissner was 38 U.S.C. § 802 (g) which provided that the insured:

"Shall have the right to designate the beneficiary of the insurance [within a designated class] . . . and shall have the right to change the beneficiary or beneficiaries of such insurance without the consent of the beneficiary or beneficiaries."

Since Wissner, California has refused to follow the rule that Wissner established a rule that every federally created benefit must be separate property in the absence of clear congressional intent to the contrary. As was stated in the case of In re Marriage of Milhan 13 Cal.3d 129, 132, 117 Cal.Rptr. 810, "Wissner does not forbid the states from applying their community property laws to achieve an equitable distribution

of marital property, so long as the operation of those laws does not frustrate congressional intent."

CONGRESS DID NOT MANIFEST ANY INTENT TO PRECLUDE COMMUNITY PROPERTY STATES FROM EVALUATING RAILROAD RETIREMENT BENEFITS AS A COMMUNITY ASSET.

The United States suggests on pages 10 and 11 of its brief that there is a possible hardship to divorced spouses if they are denied a community interest in railroad retirement benefits that would not apply to spouses of workers covered by private plans, but that the Railroad Retirement Act read in light of the principles set out in

Wissner indicates the Congress sought to exclude divorced wives from sharing in railroad retirement benefits through application of state community property law. However, Wissner was decided long after enactment of the Railroad Retirement Act of 1937 and there is no reported history of the legislation which supports the argument that Congress intentionally sought to exclude divorced wives from sharing in railroad retirement benefits.

The most comprehensive analysis of the Railroad Retirement Act of 1937, 45 U.S.C. § 228, et. seq., as voted upon by Congress in 1935 is a House of Representatives Hearing Report, Committee on Interstate and Foreign Commerce, Retirement System for Employees of Carriers Subject to the Interstate Commerce Act, H. R. Rep. No. 1711, 74th

Cong., 1st Sess. (1935). The purpose of the act as explained by the Comittee in that report was to improve the relationship between employer and employee and to enable employees to retire with peace of mind and physical comfort. This report made no mention of the lack of benefits provided for a divorced spouse, nor does it make any reference to community property states or evidence any indication that Congress intended railroad retirement benefits to be separate property.

CALIFORNIA COURTS HAVE ALREADY HELD THAT CIVIL SERVICE PENSIONS AND MILITARY RETIREMENT BENEFITS ARE COMMUNITY ASSETS.

Although the United States suggests on page 13 that the principles

that led the California Supreme Court to conclude that railroad retirement benefits are community property may lead it to the same conclusion about other federal benefits affecting many more people, California courts have already done so.

It is established law in California that federal military retirement benefits are community property, In re Marriage of Fithian, 10 Cal.3d 592, 111 Cal.Rptr. 369, cert. denied at 419 U.S. 825, and that federal civil service retirement benefits are community property, In re Marriage of Peterson, 41 Cal.App.3d 642, 115 Cal.Rptr. 184. California law is clear that retirement benefits are community property whether they derive from a state, federal or private source, Smith v. Lewis, 13 Cal.3d 349, 355, 118 Cal.Rptr. 621.

In Fithian, the California Supreme Court noted a lack of legislative background into whether Congress intended military retirement pay to be separate or community property or whether the treatment of such benefits as community property circumvents this congressional scheme, 10 Cal.3d at 599. The Court also noted that it was anomalous that in light of Congress' intention to create an annuity plan to specifically support a serviceman's widow, it intentionally made no provisions to support a serviceman's divorced wife.

At page 600, the court concluded: "It is not incongruous for Congress to supply a program to aid widows, who no longer have husbands to provide sustenance, and to omit to do so for ex-wives who can rely on state

family law concepts of support, alimony, and community property for a source of income."

With regard to social security benefits, the Court of Appeal for the First District of California in the recent case of In re Marriage of Nizenkoff 65 Cal.App.3d 136, 135 Cal.Rptr. 189, cited by Amicus Curiae on page 10, declined to hold that social security benefits are a divisible community asset. One of the primary bases for the decision was the indication that Congress had considered the termination of marital 'relationships by divorce and expressly set forth for a method of protecting the interests of the divorced wife under the social security system. (See 45 U.S.C. (and supplement V) 402 (b) (1).) It is acknowledged however, that

there are no provisions under the Railroad Retirement Act for benefits to be payable to a divorced spouse.

RECENT AMENDMENTS TO THE SOCIAL SECURITY ACT DO NOT MANDATE THAT THE CALIFORNIA SUPREME COURT DECISION BE REVERSED OR THAT THIS CASE BE REMANDED.

The only statute contained within the Railroad Retirement Act relating to garnishment of benefits is 45 U.S.C. 231m which provides that the Railroad Retirement annuities are not subject to tax or garnishment attachment or other legal process. The recent exception to this statute cited in the Amicus brief is 42 U.S.C. 659, effective

January 1, 1975 which permits garnishment of moneys due from or payable by the United States (including Railroad Retirement Act benefits) to satisfy obligations for child support or alimony. Under this statute, service of legal process can be made upon an appropriate agent of the United States for enforcement of an individual's obligation to provide child support or alimony payments.

The definitional statute, 42 U.S.C. 662, amended May 23, 1977 defines alimony as "periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual and (subject to and in accordance with the State law) includes but is not imited to, separate maintenance, alimony pendente light, maintenance, and spousal

support;". The last sentence of subdivision (c) provides that alimony does not include the transfer of property or its value to a spouse in compliance with any community property division. Under these statutes a spouse can garnish funds to be received from the United States to pay child support or alimony but not for the enforcement of a community property division.

Respondent submits that these recent statutes do not evidence any intent that Congress, more than 30 years ago when it adopted the Railroad Retirement Act of 1937 intended to preclude states which recognize community property, from attempting to equalize the property upon dissolution of marriage by categorizing railroad retirement benefits as a community asset. This anti-garnishment statute and its exception

appear to apply equally to civil service retirement benefits and military retirement benefits which California has already recognized to be a divisible asset upon the dissolution of a marriage. (Fithian and Peterson, supra.)

The fact that the Congress has deemed it important to permit garnishment of retirement benefits for the satisfaction of child support and alimony obligations certainly does not not imply that Congress has now determined to prohibit states from protecting the rights of divorced spouses who can rely on state law.

It is difficult to conceive that Congress in enacting the recent legislation relating to garnishment, intended to permit husbands covered under the Railroad Retirement Act to divorce their wives of many years near

the time the husbands are entitled to receive benefits, and to deny a wife due process by prohibiting the states from enabling the wife to share in those benefits in an amount based on the number of years of service performed during the marriage. While it is suggested that the wife can still rely on the state concept of alimony, that is not the case herein where the trial court did not award the respondent any spousal support.

CONCLUSION

The decision of the California Supreme Court is only one part of California's scheme pertaining to dissolution of marriage and the division of property upon dissolution. Niether the petition

nor the Amicus Curiae Brief have set forth any statute or legislative history evidencing the intent of Congress to make railroad retirement benefits separate property or to prohibit the states from applying their community property laws to effectuate an orderly disposition of property upon dissolution of marriage.

The only persons affected by this decision are railroad workers and their spouses, whose marriages will be dissolved in the State of California. California has treated nearly every federal, state and private pension as community property in assessing the value of community assets for appropriate distribution on dissolution. It is, therefore, submitted that this case does not require the protection of a federal right by undue interference with a

legitimate determination of the California Supreme Court of the rights of California residents.

Respectfully submitted,

By Ray C. Bennett
RAY C. BENNETT

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

CITATIONS

Cases:

Cases—Continued

Statutes:

Statutes—Continued

Miscellaneous:

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No. 77-533

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ANGELA HISQUIERDO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

On November 28, 1977, the Court invited the United States to participate in this case as *amicus curiae*. This brief expands on the brief we submitted before the Court granted the petition for a writ of certiorari.

QUESTION PRESENTED

The United States will address the question whether federal law prohibits the states from applying community property rules to a worker's expectation of receiving retirement benefits.

STATEMENT

A. The Railroad Retirement Act

The Railroad Retirement Act of 1974, 88 Stat. 1305, 45 U.S.C. (Supp. V) 231-231t, provides a system of retirement and disability benefits for persons employed in the railroad industry. Unlike private retirement systems, which typically are supported by voluntary or contractual contributions made by employees and employers, benefits payable under the Railroad Retirement Act are financed by means of employment taxes. The Internal Revenue Service collects the employment taxes under authority of the Railroad Retirement Tax Act (26 U.S.C. (and Supp. V) 3201 *et seq.*).

To qualify for benefits under the Act, persons must meet the eligibility requirements of 45 U.S.C. (Supp. V) 231a. Subsections (a) and (b) provide primary and supplemental benefits for specified categories of railroad employees, while subsection (c) provides additional benefits to spouses of such persons. In order to qualify for the benefits, a spouse must live with the employee, receive regular contributions from the employee for support, or be entitled to support from the employee under a court order. 45 U.S.C. (Supp. V) 231a(c)(3)(i). Benefits for a spouse terminate, however, when "the spouse and the [employee] are absolutely divorced." 45 U.S.C. (Supp. V) 231d (c)(3)(B).

The Railroad Retirement Act is modeled in most respects on the Social Security Act, 49 Stat. 622, as

amended, 42 U.S.C. (and Supp. V) 401 *et seq.*, which it displaces with respect to employment in the railroad industry. Like Social Security benefits, benefits payable under the Railroad Retirement Act are not contractual;[1] they are not part of the consideration earned by an employee and are not considered to be deferred compensation. Moreover, the right to receive a benefit under the Railroad Retirement Act is never "vested," because Congress may modify or withdraw that right at any time, even after an award of an annuity has been made.[2] *Flemming* v. *Nestor*, 363 U.S. 603; *Bernstein* v. *Ribicoff*, 299 F.2d 248, 251-252 (C.A. 3), certiorari denied, 369 U.S. 887; *Price* v. *Flemming*, 280 F.2d 956, 959 (C.A. 3). Taxes that were properly collected will not be refunded if the payment schedules change, and there is no exact correspondence between taxes paid by or on behalf of an employee and the benefits to which he may be entitled.

Numerous sections of the Social Security Act are incorporated, either directly or by reference, into the Railroad Retirement Act. The rate of tax now paid by railroad employees to the railroad retirement system equals the rate paid by non-railroad employees to the social security system. 26 U.S.C. (Supp. V) 3101

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[1] *Ruhl* v. *Railroad Retirement Board*, 342 F.2d 662, 666 (C.A. 7), certiorari denied, 382 U.S. 836. See also *Flemming* v. *Nestor*, 363 U.S. 603, 608-611; *Weinberger* v. *Salfi*, 422 U.S. 749.

[2] Congress substantially revised the Railroad Retirement Act in 1974, and it changes benefit schedules frequently.

and 3201. One component of a person's railroad retirement annuity is computed on the basis of formulas contained in the Social Security Act. Moreover, under minimum guarantee provisions of the Railroad Retirement Act, an annuitant is assured that he will receive benefits under the Act at least as great as he would have received if all of his employment had been subject to the Social Security Act. 45 U.S.C. (Supp. V) 231b.[3]

If an employee lacks sufficient railroad compensation and service credits to be eligible for benefits under the Railroad Retirement Act, his credits are transferred to the Social Security Administration, where they are treated as credits under that system. 45 U.S.C. (Supp. V) 231q. In addition, survivor benefits under the Railroad Retirement Act are paid on the basis of an employee's combined railroad retirement and social security employment credits. 45 U.S.C. (Supp. V) 231c. With respect to questions of family relationship, which are of crucial importance in determining entitlement to various benefits payable under the Railroad Retirement Act, many definitions and standards applied under that Act are the same as those applied under the Social Security Act. 45 U.S.C. (Supp. V) 231a(d).

[3] Under the financial interchange arrangement between the railroad retirement and social security systems, there is a computation of the amount of social security benefits which railroad retirement annuitants would have received if their employment had been subject to the Social Security Act. In addition, a computation is made of the amount of taxes under the Federal Insurance Contributions Act that railroad employees would have paid if they were covered by the Social Security Act. A transfer of the difference between those two amounts then is made either to the railroad retirement system or to the social security system, depending on the system in whose favor the difference exists. 45 U.S.C. (Supp. V) 231f(c)(2).

The Railroad Retirement Act provides that railroad retirement annuities are not subject to legal process and cannot be "anticipated" (45 U.S.C. (Supp. V) 231m):

> Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated * * *.

The only exception to the applicability of this rule is stated in Section 459 of the Social Security Act (42 U.S.C. (Supp. V) 659), which permits garnishment of railroad retirement benefits to satisfy an obligation for alimony or child support. A definitional statute added in 1977 provides that alimony "does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses." Pub. L. 95-30, Section 501(d), 91 Stat. 160, adding Section 462(c), to be codified at 42 U.S.C. 662(c).

B. The Present Proceedings

Petitioner was employed by the Atchison, Topeka & Santa Fe Railroad from 1942 to 1975 and subsequently by the Los Angeles Union Passenger Terminal. Because those employers are covered by the Railroad Retirement Act, 45 U.S.C. (Supp. V) 231 (a)(1), petitioner will become eligible for retirement benefits under the Act at age 60 (Pet. App. 2).

Petitioner and respondent were married in 1958. They separated in 1972, and petitioner filed a petition for dissolution of the marriage in 1975 (A. 2). In an interlocutory decree, the state trial court divided the parties' community property equally between them (A. 4). The court held, however, that respondent had no interest in petitioner's expectation of receiving railroad retirement benefits (A. 4; Pet. App. 1-2). The state court of appeal affirmed, reasoning that the railroad retirement benefits are not contractual and that Section 231m precludes application of state community property laws (133 Cal. Rptr. 684). The court explained that "the federal law is most explicit * * * [and] [t]he interest or right given the *employee* is separate and distinct from that given to the spouse or wife or widow or widower * * *." (133 Cal. Rptr. at 686; emphasis in original).

The Supreme Court of California reversed (Pet. App. 1-12; 19 Cal. 3d 613, 139 Cal. Rptr. 590, 566 P.2d 224). Starting with the general rule that "[i]n California, retirement benefits resulting from employment during marriage are community property, subject to division in the event of dissolution of the mar-

riage" (Pet. App. 3), the court found no overriding contrary intent of Congress in the provisions of the Railroad Retirement Act. Although the court acknowledged that the Act prohibits assignment or anticipation of benefits, the court determined (Pet. App. 7) that "the essential purpose of section 231m [was] to bar creditors of the beneficiary from reaching annuity payments, rather than to prevent a spouse from vindicating her ownership interest in the pension." The court similarly rejected arguments based on the existence of a separate annuity for spouses (Pet. App. 9-10), finding no evidence that "Congress intended that although a spouse is entitled to both a separate annuity and the support of the railroad employee during marriage, both of these benefits are withdrawn upon divorce."

SUMMARY OF ARGUMENT

We do not quarrel in this case with determinations of state law. Although anticipated benefits under the Railroad Retirement Act are never vested, and thus may not be "property" at all in the strictest sense (see *Flemming* v. *Nestor*, 363 U.S. 603), the California state courts may legitimately treat them as property, and indeed as community property, so long as that treatment does not interfere with overriding federal interests. The question here, therefore, is simply whether the Railroad Retirement Act embodies such overriding federal interests. We believe that it does.

The starting point of our inquiry is *Wissner* v. *Wissner*, 338 U.S. 655. *Wissner* held that California could not apply its community property laws to insurance proceeds under the National Service Life Insurance Act, 54 Stat. 1008, 38 U.S.C. (1946 ed.) 801 *et seq.*, because "Congress ha[d] spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other" (338 U.S. at 658). The Court explained (*id.* at 659): "Whether directed at the very money received from the Government or an equivalent amount, the judgment below [upholding application of community property law] nullifies the soldier's choice and frustrates the deliberate purpose of Congress. It cannot stand."

The same reasoning applies here. The evident purpose of the Railroad Retirement Act was to provide security for retired or disabled workers within the railroad industry. Although the Act provides separate benefits for a qualifying spouse during marriage, 45 U.S.C. (Supp. V) 231a(c)(1), Congress enacted that provision, not to recognize an independent claim by spouses, but to augment benefits for workers with greater support obligations. The additional benefits terminate on divorce, when the worker presumably is again responsible only for himself. 45 U.S.C. (Supp. V) 231d(c)(3)(B). If divorced employees in community property states must nevertheless surrender one-half of their individual benefits to former spouses regardless of need, the security envisioned by Congress would be imperiled.

Congress has struck a balance between the rights of retired railroad workers and the rights of divorced spouses. While providing that annuities generally are exempt from garnishment or attachment, 45 U.S.C. (Supp. V) 231m, Congress has permitted garnishment to satisfy alimony or child support obligations. See 42 U.S.C. (Supp. V) 659. However, Congress has further specified that "alimony" does not include "any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement * * *." Pub. L. 95-30, Section 501(d), 91 Stat. 160, adding Section 462(c), to be codified at 42 U.S.C. 662(c). It is not the province of the California courts to strike a different balance.

State courts remain free to make alimony awards to a divorced spouse based on need. In setting the amount of such awards, the state courts may take into account benefits payable to a covered employee under the Railroad Retirement Act. We say only that California may not routinely cut benefits for a retired railroad worker in two, regardless of the needs of the divorced spouse or the economic consequences to the retired worker.

ARGUMENT

BENEFITS PAYABLE TO RETIRED OR DISABLED WORKERS UNDER THE RAILROAD RETIREMENT ACT MAY NOT BE DIVIDED UNDER COMMUNITY PROPERTY LAWS

We start with an established premise: this Court does not sit to review questions of state law. *Herb* v. *Pitcairn*, 324 U.S. 117. "[Its] only power over

state judgments is to correct them to the extent that they incorrectly adjudge federal rights" (*id.* at 125-126). Unless the decision of the Supreme Court of California in this case disregards federal rights or policies, its correctness is not open to question here.

Petitioner's principal argument is that the expectation of receiving benefits under the Railroad Retirement Act is not "property" at all and, by definition, cannot be "community property." Benefits payable under the Act are not contractual, *Ruhl* v. *Railroad Retirement Board*, 342 F.2d 662, 666 (C.A. 7), certiorari denied, 382 U.S. 836, and the right to receive them is not vested. See *Flemming* v. *Nestor*, *supra*; *Bernstein* v. *Ribicoff*, *supra*. But the decision of the Supreme Court of California to treat unrealized federal benefits as property, even if erroneous, is not itself impermissible. It must be shown that the consequences of such treatment are inimical to the objectives of the federal program.

The Supreme Court of California observed that "whenever there is a conflict between a federal statute affording annuity or insurance benefits and state community property laws the federal statute must prevail" (Pet. App. 4). The court then determined, however, that application of its community property laws to benefits payable under the Railroad Retirement Act does not conflict with federal law. In our view, that conclusion is mistaken.

A. State Property Laws Must Yield To Federal Statutes

State property laws undoubtedly must give way to overriding federal policies. For example, in *Wissner* v. *Wissner*, 338 U.S. 655, an Army officer named his

mother and father as beneficiaries under his National Service Life Insurance Policy, making no provision for his wife. The National Service Life Insurance Act provided that the insured "shall have the right to designate the beneficiary or beneficiaries of the insurance * * * and shall * * * at all times have the right to change the beneficiary or beneficiaries * * *." *Id.* at 658. The Act further provided that payments to the beneficiary would be "exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." *Id.* at 659. A California court held that the proceeds of the policy, which had been purchased with community funds, were community property; it ordered that one-half of the proceeds be paid to the widow by the named beneficiaries. *Id.* at 658.

This Court reversed, stating that "Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other." *Ibid.* The Court said that "[w]hether directed at the very money received from the Government or an equivalent amount, the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress." *Id.* at 659. Moreover, the Court found (*ibid.*), the diversion of future payments to be received by the beneficiary was a "seizure" prohibited by the anti-attachment provision of the Act.

The Court followed a similar analysis in *Free* v. *Bland*, 369 U.S. 663. The Supreme Court of Texas

held that Texas community property law took precedence over a Treasury Regulation creating a right of survivorship in United States Treasury Bonds. *Id.* at 664-666. This Court disagreed, observing that "[t]he clear purpose of the regulations is to confer the right of survivorship on the surviving co-owner. Thus, the survivorship provision is a federal law which must prevail if it conflicts with state law [citing *Wissner*]" (*id.* at 668).

These principles are not casually employed. State property interests "should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." *United States* v. *Yazell*, 382 U.S. 341, 352. But, once a conflict has been identified, its resolution does not depend on the comparative weights of the state and federal interests. "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free* v. *Bland*, *supra*, 369 U.S. at 666.

The question in this case, therefore, is whether application of California's community property laws to petitioner's benefits conflicts with the policies of the Railroad Retirement Act.

B. The Railroad Retirement Act Does Not Provide Benefits To Divorced Wives And Limits The Extent To Which Benefits May Be Anticipated Or Attached

1. The Railroad Retirement Act of 1935, the predecessor of the present Act, was enacted to provide a comprehensive program of retirement and disability benefits for workers in the railroad industry. Although major rail companies had established private benefit plans, those plans had "fail[ed] to provide properly for the retirement of employees who should be retired." H.R. Rep. No. 1711, 74th Cong., 1st Sess. 10 (1935). Under the private plans, "[p]ensions [were] withheld, granted, reduced, or wholly discontinued at the pleasure of the employer" (*ibid.*). Congress anticipated that, after passage of the bill, "a reasonable annuity will provide enough to enable retired employees to enjoy the closing days of their lives with peace of mind and physical comfort" (*ibid.*).

The annuity plan was designed to help not only the retired worker but also the industry in general. The House Report, noting that older employees were discouraged from retirement by their dependence on wages, observed that "[t]he payment of wages to such employees prevents economies which would probably result from the payment of reasonable annuities" (*ibid.*). The Report estimated that most of the 60,000 railroad employees over 65 years of age would retire "if given assurance of reasonable protection during their remaining years" (*ibid.*). The retirement program thus would assure a continuing supply of jobs for younger workers.

The 1935 Act provided annuities only for the workers themselves.[4] It did not provide payments to current or former spouses, and the amount of the annuity did not depend on the marital status of the worker. The Act also stated that "[n]o annuity payment shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated." 49 Stat. 973; 45 U.S.C. (1970 ed.) 228*l*.

Although the 1935 Act did not expressly prohibit the reduction of a worker's benefits by application of state community property laws, we believe that such a reduction would have been inconsistent with the Act's objectives. A retiring worker faces a diminution in income to the extent that annuity payments fall short of prior wages. If the worker also were required to pay to his former spouse one-half of that diminished income—or at least one-half of the sum attributable to the years worked during marriage—his economic security in many cases would be severely threatened. To support himself, he might be required to continue work at his regular wages, with the attendant consequences that Congress by the 1935 Act sought to avoid.[5] Whether or not Congress was willing to tolerate this result in cases of need by the spouse (see pages 18-20, *infra*), it is unlikely that Congress wished to have the benefits diluted by a mechanical division of assets under community property laws.

[4] An exception was made for payments to a surviving spouse upon the death of a retired worker. 49 Stat. 970.

[5] This would not hold true in every case. For example, if a worker were married throughout his period of employment and divorced on the day of his retirement, his share of the income would actually increase whenever the entire annuity exceeded one-half of his prior wages and the annuity were not diminished by alimony or a community property division. But state law cannot be allowed to interfere with the congressional objective in most cases merely because in some cases the interference would not frustrate the federal policy.

The policies of the 1935 Act have been carried over into the present statute. Although the Act was amended in 1951 to provide an annuity for a qualifying spouse of a retired worker (65 Stat. 683; see 45 U.S.C. (Supp. V) 231a(c)(1)), the legislative history of the amendment makes clear that Congress did not intend to recognize any special right or interest that the spouse should have in the railroad retirement system. H.R. Rep. No. 976, 82d Cong., 1st Sess. 9, 49-50, 66 (1951); S. Rep. No. 890, 82d Cong., 1st Sess. 17-18, 21-22, 64 (1951). Congress simply chose to increase benefits for retired workers with greater support obligations, rather than to enact a general increase in benefits for all workers. Consistently with this objective, Congress provided that the spouse's benefit was to terminate on divorce, when the worker presumably was again responsible only for himself. 45 U.S.C. (Supp. V) 231d(c)(3)(B).

Indeed, despite the fact that a retired worker sometimes must make alimony payments from retirement income, Congress declined to provide a (divorced) spouse's benefit even to workers with support obligations under a court order, although it provided

such a benefit to a spouse during the period after separation but prior to divorce. 45 U.S.C. (Supp. V) 231a(c)(2)(i). Because there is no divorced spouse's benefit, a divorced worker may have less available benefits on which to live after a divorce; even without a community property division, a retired worker paying alimony would support two households on his annuity alone. The effect of the decision below is to increase this "divorce penalty" without any showing that a further reduction in a worker's available benefits is justified by the respective conditions of the parties.

The lack of provision for payments to former spouses is not accidental. In 1966 the Chairman of the Railroad Retirement Board, testifying before a congressional subcommittee, opposed a suggestion to eliminate discrepancies between the Railroad Retirement Act and Social Security Act with regard to residual death benefits for divorced widows.

> MR. HABERMEYER [the chairman]: * * * We doubt that, where a man has actually divorced his wife, or the wife divorced the husband, there is any good reason for paying her benefits after his death. Wouldn't it be better for any moneys flowing from his death to go to surviving children? For example, take the particular case of a man aged 55, who has worked in the railroad industry all of his life. At age 50 his wife divorces him, and he has adult children. Now, if he were to die covered under social security, she would draw monthly benefits as his surviving divorced

> wife. We feel that under our act we would rather have the moneys go to these adult children.
>
> * * * * *
>
> I think there is one big difference in the two systems in this respect. The benefits that the wife would get under social security would have no effect with regard to adult children. But because of the residual payment that we have, any payments we would make to the divorced wife would reduce the residual payments to which these children might become entitled. * * * We just feel that those moneys should flow to the children, the adult children, rather than to the divorced wife.
>
> * * * * *
>
> MR. MACDONALD: My last statement or question is, Isn't one of the main purposes of the bill as sent up—as I read, by the administration, but I take it by you people, really—to put social security and the railroad retirement on a par?
>
> MR. HABERMEYER: If we think that certain social security payments are not warranted, we feel that we don't have to follow.

(See Hearings on H.R. 7298 (Railroads: Technical Amendments to Railroad Retirement, Tax, and Unemployment Insurance Acts, and Providing Benefits for Students) before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 89th Cong., 2d Sess. 31 (1966).)

Although Congress has established certain benefits for divorced wives and widows under the Social Security Act, *e.g.*, 42 U.S.C. (and Supp. V) 402(b)(1),

it has not provided equivalent benefits under the Railroad Retirement Act. The decision not to do so appears to reflect a determination that the finite resources of the Railroad Retirement Fund should be expended for the benefit of retired workers and their children rather than divorced wives. Those policy choices, whatever their wisdom, are for Congress to make. They cannot be set aside because the states, in the application of their property laws, recognize different priorities.

2. The balance that Congress has struck between the claims of retired railroad workers and their divorced spouses is reflected in the anti-assignment provisions of the Act. The 1974 Act, like its predecessor, flatly prohibits assignment, attachment, or garnishment of annuity payments; it also provides that payments may not be anticipated. 45 U.S.C. (Supp. V) 231m. Community property divisions of benefits, whether called "assignments" or "anticipations" of benefits, would fall within the scope of this prohibition.

This blanket prohibition, however, is subject to a limited exception. Section 459 of the Social Security Act, 42 U.S.C. (Supp. V) 659, which overrides contrary provisions in other social insurance and retirement statutes, permits the garnishment of federal benefits to satisfy alimony or child support obligations. Congress enacted this provision in 1974 to combat increases in welfare payments resulting from an inability to compel payments of support obligations from solvent but unwilling parents. S. Rep. No. 93-

1356, 93d Cong., 2d Sess. 42-43 (1974). The exception is not limited to such cases, however, but applies "whether or not the family upon whose behalf the proceeding is brought is on the welfare rolls" (*id.* at 54).

Section 459, in turn, was affected by a 1977 amendment. Congress stated that "alimony" does not include "any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement * * *." Pub. L. 95-30, Section 501(d), 91 Stat. 160, adding Section 462(c), to be codified at 42 U.S.C. 662(c). Senator Nunn, the sponsor of the amendment before the Senate,[a] explained the definition of "alimony" in the following terms (123 Cong. Rec. S6727 (daily ed., April 29, 1977)):

> The amendment would define "alimony" * * * to mean periodic payments of funds for the support and maintenance of the spouse (or former spouse). It includes (subject to and in accordance with State law) separate maintenance, alimony pendente lite, maintenance, and spousal support. This definition is in keeping with the increasing State use of "support" terminology instead of "alimony." * * * The amendment also clarifies the committee intent that "alimony" does not include payments or transfers of property made in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses.

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[a] This portion of Public Law 95-30 was introduced as a floor amendment and was not discussed in the committee report accompanying the bill.

It is apparent from the terms of Public Law 95-30, and the brief remarks of Senator Nunn, that Congress intended to distinguish between payments necessary for "support" and payments based on the economic efforts of the parties during marriage. An exception for the anti-assignment statutes is recognized for the former purpose but not the latter.[7] This distinction is a reasonable one. "[T]he community property principle rests upon something more than the moral obligation of supporting spouse and children: the business relationship of man and wife for their mutual monetary profit. [Citation omitted.] Venerable and worthy as this community is, it is not, we think, as likely to justify an exception to the congressional language [of the anti-garnishment provision of the National Service Life Insurance Act] as specific judicial recognition of particular needs, in the alimony and support cases." *Wissner* v. *Wissner*, *supra*, 338 U.S. at 660.

The Supreme Court of California held that the anti-assignment provision of the statute is irrelevant because respondent "claims not as a creditor, but as an owner with 'a present, existing, and equal interest.'" Pet. App. 5-6, quoting *Phillipson* v. *Board of Administration*, 3 Cal. 3d 32, 44, 473 P.2d 765, 772. But that conclusion avoids the federal statute by begging the

[7] The Comptroller General has concluded that, in light of Section 459 and the 1977 amendment, Armed Forces retirement benefits are not subject to division under community property statutes. We attach a copy of the Comptroller General's opinion as an appendix to this brief.

question whether a spouse has such an interest or can have one under federal law, and in so doing ignores the teaching of *Wissner*. There the Court found a "flat conflict" between a federal statute almost identical to Section 231m and a state court judgment declaring insurance proceeds to be the community property of the decedent and his widow. The state court's decision in *Wissner* was based on a finding that the spouse had an interest in the insurance, just as the present decision was based on a finding that respondent has an interest in the retirement benefits. But, as the Court held in *Wissner*, that reasoning cannot survive the fact that the federal statute, there as here, gives the entire interest in the benefits to the wage-earner (or his beneficiary) and forbids anticipation, assignment or garnishment of the interest. When federal law designates a single beneficial owner in this manner, state law cannot say that there were "really" two beneficial owners all along.[8]

[8] These principles cannot be avoided by awarding the spouse more than half of the community property to offset the fact that the spouse has no claim to railroad retirement benefits. See *Wissner*, *supra*, 338 U.S. at 659. Section 231m prohibits the anticipation of retirement benefits in any manner. Moreover, an unequal distribution of other community property, without any demonstration of need for the spouse's support, would increase the threat of economic uncertainty for retired workers, contrary to the evident purpose of the Railroad Retirement Act. States have no license to frustrate congressional policy so long as they do it indirectly.

C. Needy Spouses May Receive Part Of The Railroad Retirement Benefits As Alimony

We recognize that spouses of railroad workers may be at a disadvantage, at least compared to spouses of workers covered by private pension plans, if the federal benefits cannot be treated as community property. But that is not a sufficient reason to depart from established principles in this case. The retirement annuity is a creation of Congress. As we have discussed (pages 13-14, *supra*), prior to passage of the Railroad Retirement Act of 1935, retired workers (and their spouses) had no assurance of a secure retirement but depended on the inadequate and often unfair programs of the private employers. The development of a sound retirement system for railroad workers at the least gives divorced spouses an opportunity to receive alimony payments in cases of need.

State courts may require support payments for divorced spouses; indeed, the spouses have been assured recourse to garnishment proceedings if necessary. 42 U.S.C. (Supp. V) 659. In setting the level of alimony payments, state courts may consider the amount of railroad retirement benefits to be received. The courts may also encourage the parties voluntarily to take such payments into consideration in reaching reasonable property settlements (although garnishment would not be available as a remedy for nonpayment). What the state courts may not do is divide the retirement payments in half as a matter of course, without regard for the needs of the divorced spouse or the effect on the retired worker.

If the denial of benefits to non-needy divorced spouses is harsh, Congress could amend the Railroad Retirement Act. As we have pointed out (page 17, *supra*), the Social Security Act extends benefits to divorced spouses in certain cases.[9] Should the denial of benefits to spouses of railroad workers remain a continuing problem, despite the availability of alimony payments, the remaining distinctions between social security and railroad benefits could be eliminated.

Other legislative choices are also available. The House of Representatives has recently passed a bill (H.R. 8771, 95th Cong., 2d Sess. (1978)) that would subject federal Civil Service retirement benefits to all court-ordered divisions in divorce actions, including divisions pursuant to community property settlements. One supporter of the bill (Rep. Schroeder) stated that it would change the fact that "under the supremacy clause (Article VI, cl. 2) of the Constitution, valid congressional enactments preempt conflicting State community property provisions." 124 Cong. Rec. H79 (daily ed., January 23, 1978). Another supporter (Rep. Harris) remarked that "this law may be a good model for our Federal pension plans * * *." *Id.* at H80. Thus, a legislative solution, if one is needed, is not beyond expectation.

In any event, this case is not one of special hardship. The California courts have not found that re-

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[9] The California court of appeal has held that retirement benefits under the Social Security Act are *not* community property. *Nizenkoff* v. *Nizenkoff*, 65 Cal. App. 3d 136.

spondent needs a portion of petitioner's retirement benefits for support. She has received one-half of the admitted community property and will be entitled to Social Security retirement payments of which petitioner will get no part. There is no reason to read the Railroad Retirement Act to allow her one-half of petitioner's railroad retirement benefits as well.

CONCLUSION

The judgment of the Supreme Court of California should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

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DALE G. ZIMMERMAN,
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JUNE 1978.

APPENDIX

THE COMPTROLLER GENERAL
OF THE UNITED STATES
Washington, D.C. 20548

DECISION

FILE: B-190985 DATE: April 18, 1978

MATTER OF:
Major Herbert G. Wells, USAF (Retired)

DIGEST:

1. An Air Force disbursing officer may not pay a retired officer's pay into the Registry of a Texas State court as directed by the court in a garnishment proceeding for the collection of the officer's debt to his former wife incident to a community property settlement, since community property is not within the definition of "alimony" for which the Federal Government has waived its immunity to State garnishment proceedings pursuant to 42 U.S.C. 659 (Supp. V, 1975).

2. The amount of a military member's or Federal employee's pay or salary subject to garnishment for child support or alimony pursuant to 42 U.S.C. 659 (Supp. V, 1975) is limited by section 303(b) of the Consumer Credit Protection Act, 15 U.S.C. 1673(b) (1970), as amended by section 501(e), Title V, Public Law 95-30. Thus, a State court garnishment order, to the extent it exceeds such limitations should not be followed by a disbursing officer.

This action responds to a letter, with enclosures, from the Chief, Accounting and Finance Division, Air Force Accounting and Finance Center, requesting an advance decision as to the propriety of making payment on a voucher in the amount of $4,817.83 to the Registry, District Court of Foard County, Texas, pursuant to the order of that court for payment incident to a writ of garnishment of retirement benefits owed to Major Herbert G. Wells, USAF (Retired), 459-44-2925. The request was approved by the Department of Defense Military Pay and Allowance Committee and forwarded to us on December 30, 1977, as submission No. DO-AF-1283.

On January 21, 1977, the United States Attorney in Fort Worth, Texas, was served notice of application by Ellen V. Wells for a writ of garnishment against Major Wells based on a division of community property, included in a November 4, 1975 divorce decree, awarding Mrs. Wells $253.57 per month, plus a portion of cost of living or other increases, from her former husband's military retired pay. The notice indicated that Major Wells was indebted to Mrs. Wells and directed the United States, acting through the Department of the Air Force, to appear before the District Court of Foard County, Texas, and disclose the amount in which it was indebted to Herbert G. Wells for retired pay. Mrs. Wells subsequently moved to have the Air Force pay Major Wells' retirement pay into the Registry of the court to be held subject to the court's further orders. On June 3, 1977, the court granted the motion and entered the following order:

> "IT IS, THEREFORE, ORDERED, ADJUDGED, and DECREED that Defendant, United States Air Force and United States of America pay all monies that have been accumulated and that have come due and that will come due during the pendency of this suit to the extent of $4,817.83, and remit same in the amount of $4,817.83 into the Registry of the Court.
>
> "IT IS FURTHER ORDERED that the monies paid into the Registry of this Court shall be held subject to the further orders of this Court."

In a legal memorandum submitted with the request for advance decision it is indicated that the member's debt to Mrs. Wells arises out of a community property settlement and not from child support, since there were no minor children of the marriage, or alimony, since under Texas law there is no alimony after divorce. It is also pointed out that under Texas law garnishment against "current wages" is prohibited. In addition, it is noted that the order to pay "all monies that have been accumulated and that have come due and that will come due" appears contrary to the maximum earnings subject to garnishment as prescribed by 15 U.S.C. 1673 as amended. Therefore, the Accounting and Finance Officer submits the following specific questions for consideration:

> "a. Is retired pay received by Herbert G. Wells 'current wages' within the meaning of Article 16, Section 28, Constitution of Texas?

"b. Based on Article 16, Section 28, Constitution of Texas, may a disbursing officer of the United States remit to the Registry of the Court pursuant to a Writ of Garnishment served pursuant to 42 U.S.C. § 659?

"c. Is a community property settlement from Texas excluded from the definition of alimony by Public Law 95-30 thereby demonstrating that such is not within the waiver of sovereign immunity?

"d. Based on PL 95-30, may a disbursing officer remit funds pursuant to a Writ of Garnishment and subsequent order purporting to compel the United States to pay into court to satisfy a community property obligation?

"e. May a disbursing officer remit funds in excess of the maximum prescribed by the Consumer Credit Protection Act (15 U.S.C. § 1673 (b)(2), as amended by PL 95-30) if so ordered by a state court?"

The primary question in this case is that addressed in questions c and d above. That is, may the disbursing officer pay over the member's retired pay to someone other than the member as directed by the State court's garnishment order to satisfy a community property debt?

Section 459 of the Social Security Act, as added by the Social Services Amendments of 1974, Public Law 93-647, January 4, 1975, 88 Stat. 2337, 2357, 42 U.S.C. 659 (Supp. V, 1975), operates to remove, in very limited circumstances, the bar of sovereign immunity that prevented garnishment of the pay of Federal employees and members of the Armed Forces.

That statute provides in effect that such pay due from, or payable by, the United States—

> "* * * shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process brought for the enforcement, against such individual of his legal obligations *to provide child support or make alimony payments.*" (Emphasis added.)

For the purpose of clarifying such garnishment provisions, section 501, Public Law 95-30, May 23, 1977, 91 Stat. 126, 157-162, amended the Social Security Act to, among other things, add section 462(c) defining the term "alimony" for the purpose of section 459 as follows:

> "(c) The term 'alimony', when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, alimony pendente lite, maintenance, and spousal support; such term also includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction. *Such term does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement,* equitable distribution of property, or other division of

property between spouses or former spouses." (Emphasis added.)

Since from the divorce decree, and in view of Texas law which does not provide alimony after divorce, it is clear that the debt for which the garnishment order was issued in this case arises out of a community property settlement and not from alimony, the United States is not subject to that garnishment order. See *Marin* v. *Hatfield*, 546 F. 2d 1230 (5th Cir. 1977), and *Kelly* v. *Kelly*, 425 F. Supp. 181 (W.D. La., 1977). Accordingly, there is no authority to pay Major Wells' retired pay to the Registry of the court, and payment on the voucher submitted may not be made. See 44 Comp. Gen. 86 (1964); 54 Comp. Gen. 424 (1974). Questions c and d are answered in the negative.

Questions a and b are predicated upon arguments relating to the validity of the court's order under Texas law. Since our answers to questions c and d provide a basis for response to the court's order and for the payment of the member's retired pay, answers to questions a and b will not be provided.

Also, while question e concerning limitations on the amount of pay subject to garnishment need not be answered for the purposes of this case, we believe the following to be appropriate. Section 501(e), Public Law 95-30, *supra*, 91 Stat. 161, in clarifying the garnishment provisions, also amended section 303(b) of the Consumer Credit Protection Act, Public Law 90-321, May 29, 1968, 82 Stat. 163, 15 U.S.C. 1673 (b) (1970), to provide that the maximum disposable

earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed—

> "(A) where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), 50 per centum of such individual's disposable earnings for that week; and
>
> "(B) where such individual is not supporting such a spouse or dependent child described in clause (A), 60 per centum of such individual's disposable earnings for that week;
>
> except that, with respect to the disposable earnings of any individual for any workweek, the 50 per centum specified in clause (A) shall be deemed to be 55 per centum and the 60 per centum specified in clause (B) shall be deemed to be 65 per centum, if and to the extent that such earnings are subject to garnishment to enforce a support order with respect to a period which is prior to the twelve-week period which ends with the beginning of such workweek."

Those restrictions were clearly meant to apply to garnishment proceedings for child support or alimony authorized by section 459 of the Social Security Act. See the material included in the Congressional Record by Senator Russell Long, Chairman of the Senate Committee on Finance, in connection with the amendment to section 303(b) of the Consumer Credit Protection Act, 122 Cong. Rec. S10848, S10850 (daily

ed. June 28, 1976). Pursuant to section 303(c) of the Consumer Credit Protection Act, 15 U.S.C. 1673 (c), no court of the United States or any State may make, execute, or enforce any order or process in violation of section 303. Accordingly, it appears that to the extent a garnishment order exceeds the limitations in section 303, it would be unlawful and should not be followed by the disbursing officer. Question e is, therefore, answered in the negative.

/s/ R. F. Keller
Deputy Comptroller General
of the United States

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 267719 47

IN THE

Supreme Court of the United States

October Term, 1978
No. 77-533

JESS H. HISQUIERDO,

Petitioner,

vs.

ANGELA HISQUIERDO,

Respondent.

On Writ of Certiorari to the Supreme Court of California.

Brief Amicus Curiae of the NOW Legal Defense and Education Fund.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Miscellaneous

Regulations

Rules

Statutes

Textbooks

IN THE

Supreme Court of the United States

October Term, 1978
No. 77-533

JESS H. HISQUIERDO,

Petitioner,

vs.

ANGELA HISQUIERDO,

Respondent.

On Writ of Certiorari to the Supreme Court of California.

Brief Amicus Curiae of the NOW Legal Defense and Education Fund.

INTEREST OF AMICUS CURIAE.

The NOW Legal Defense and Education Fund, Inc. ("NOW LDEF") is a non-profit civil rights organization established in 1971 to perform a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. Its parent organization, the National Organization for Women ("NOW"), is a national membership organization of over 75,000 men and women in 700 chapters throughout the country.

A major program focus of the NOW LDEF has been in the area of marital property law reform. Its activities in this regard have included the filing of an amicus brief in *In re Marriage of Fithian*, 10

Cal.3d 592, 517 P.2d 449, 111 Cal.Rptr. 369, *cert. denied* 419 U.S. 825 (1974), in which the California Supreme Court decided that federal military retirement benefits based on services performed during a marriage are an asset of the community under California community property laws. The *Fithian* decision recognizes that marriage is a partnership to which both members contribute time, energy and labor. Both members have made possible acquisition of benefits by one member; thus, each should be entitled to share those benefits.

As in *Fithian,* the resolution of the legal questions posed here necessitates a policy decision about the extent to which the economic contributions to a marriage of both partners should be recognized. The interest of the NOW LDEF in securing equal rights and, in particular, in eliminating sex bias in all aspects of marital property law, compels it to seek to participate in this case and to urge the affirmance of the decision of the California Supreme Court.

Both parties have consented to the filing of this brief, and letters of consent have been filed with the clerk pursuant to Rule 42(2).

SUMMARY OF ARGUMENT.

It is axiomatic that federal law should not preempt state law, especially where domestic relations is at issue, unless there exists a clear statement by Congress to that effect. The Railroad Retirement Act was devised to ensure that retired railroad workers and their families would have sufficient income to provide a decent living. The mere fact that Congress has not seen fit to create a divorced spouse's benefit in the Act does not represent the clear legislative determination that

divorced spouses should be deprived of their community interest in the retirement annuity. To the contrary, the failure to provide such a benefit evidences a congressional decision that divorced spouses should be protected by state family law, including community property principles. It is to state family law that divorced spouses have historically looked, and by its silence, Congress has implicitly suggested that state law should still control. Had it intended otherwise, and thereby deprived non-employee spouses of their community interest, Congress would have undoubtedly spoken in more direct terms.

Nor does a definitive legislative statement exist in the Railroad Retirement Act's anti-assignment provision, 45 U.S.C. §231m. Like similar provisions in other government benefit programs, its sole purpose is to protect the benefits of retired workers and their families from creditors, to ensure that these benefits will provide a decent degree of support in retirement. To suggest that this type of provision should pose a bar to a community property interest as well indicates a misreading of both the anti-assignment section and of community property principles. A community interest is an equal and present interest in the property, and it is irrelevant which member of the couple actually performed the work or service which generated the property. A divorced spouse has the same right and interest to a portion of the property as does the other spouse. It is an interest which is of a completely different nature than that of a business creditor, to which the provision is directed, and it would be a corruption of the goal of the anti-assignment provision to use it to deny a community property interest to a divorced spouse. Its purposes were otherwise.

Similarly, a 1974 amendment to the Social Security Act, 42 U.S.C. §659, and a definitional clarification of that section added three years later, 42 U.S.C. §662(c), do not alter the intent of the anti-assignment provision. The 1974 section was a waiver of the federal government's sovereign immunity, so that the pay and benefits of present and retired federal workers and recipients could be garnished and attached for payment of child support and alimony. Congress was concerned that the public was supporting the families of parents, especially fathers, who had abdicated their responsibilities. By waiving the government's sovereign immunity, Congress made parents with federal salaries and benefits susceptible to court orders. As an aspect of this effort, but no more, the various existing anti-assignment provisions were negated for purposes of child support and alimony, but Congress was not directing its attention to community property principles. By allowing for garnishment only to affect alimony and child support orders pursuant to 42 U.S.C. §659, Congress was devising a solution to a specific problem. It was not declaring that a community interest was more akin to a creditor's interest, and therefore should remain exempt from garnishment. Since a community interest is an ownership interest, it is at least as reasonable to assume that Congress was recognizing the logical inconsistency of allowing a wife to garnish or attach an interest which was already hers. In any case, 42 U.S.C. §659 was not the clear-cut statement demanding preemption.

Furthermore, the explicit exclusion of community property from the definition of alimony and child support, through 42 U.S.C. §662(c), was a clarification and no more. Courts differed after the passage of

42 U.S.C. §659 as to whether a community interest was garnishable, and because of the strict manner in which waivers of immunity are construed, Congress wanted to ensure that only those areas to which 42 U.S.C. §659 had been directed would be affected. Again, the amendment was not concerned with the issue of this case and, taken together, 42 U.S.C. §§659 and 662(c), do not represent a definitive congressional effort to preempt community property law; they were directed at another issue altogether.

The two Supreme Court cases involving preemption of community property laws, *Wissner v. Wissner,* 338 U.S. 655 (1950), and *Free v. Bland,* 369 U.S. 663 (1962), support Respondent's position, for they emphasize the requirement that a specific legislative intent is necessary for the preemption of state law. In *Wissner,* a provision clearly stated that only the named beneficiary of a serviceman's insurance policy should receive the proceeds, thus overriding any community interest. In addition, the law under which the policy was issued, the National Service Life Insurance Act, was an effort to encourage servicemen during the war years, and it was as an aspect of the war effort that servicemen were given inexpensive life insurance and the right to name their beneficiary. Similarly, in *Free,* the federal regulations under which the United States Savings Bonds were issued specifically allowed for the creation of a joint tenancy, with full ownership by the surviving member. Thus, when one member of a couple died, she could not leave a community property interest to her son, as her husband automatically became sole owner of the Bonds. Thus, in both instances, there was a definite effort by Congress to override state

community property interests; no such specific provision or intent exists in the instant case.

The equities also demand that the Respondent receive her community interest. Her husband will be eligible for a Social Security Act divorced spouse's benefit based on her work record, so that it is improper to suggest that the wife will receive an inequitable windfall from receipt of her community interest in the benefits. And, regardless of the specific facts of this case, it is appropriate that the wife have her share of the couple's earnings. Otherwise, in most cases, the working spouse will be able to retire with considerably more comfort than will the non-employee spouse who has contributed equally to the marriage. Congress has not spoken definitely against the fair allocation of this community asset, and preemption would therefore be inappropriate.

ARGUMENT.

I

THE GOALS OF THE RAILROAD RETIREMENT ACT ARE NOT VIOLATED BY EVALUATING RAILROAD RETIREMENT BENEFITS AS COMMUNITY PROPERTY.

A. The Presumptions in Favor of State Domestic Relations Policy Require a Forthright Federal Intent to Preempt That Policy.

In its brief as *amicus curiae,* the United States correctly notes that the issue in this case is whether a conflict exists between state and federal law with respect to the evaluation of railroad retirement benefits.[1] As this Court has recently restated, the initial assumption, in evaluating claims under the Supremacy Clause, is that state law should take precedence unless the contrary is " 'the clear and manifest purpose of Congress.' " *Ray v. Atlantic Richfield Co.,* 98 S.Ct.

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[1]Furthermore, the United States is correct that Petitioner's primary argument is essentially irrelevant. (Am.Br. 10.) That argument is premised on the theory that railroad retirement benefits may not be contractual, so that the right to receive them is not vested; consequently, they cannot be property. (Pet.Br. 9-14.) It is not this Court's obligation, however, to determine whether the California Supreme Court has correctly defined the nature of property in that state. *See Herb v. Pitcairn,* 324 U.S. 117, 125 (1954). That court has previously determined that "the community owns all pension rights attributable to employment during the marriage," *In re Marriage of Brown,* 15 Cal.3d 838, 844, 544 P.2d 561, 126 Cal.Rptr. 633 (1976), so that the vested or nonvested nature of those benefits is not relevant. *Id.,* at 846. Furthermore, that court has found that whether the fund from which the pensions are derived is contributory or non-contributory, as long as they flow from the employment relationship, they are community property. *In re Marriage of Fithian,* 10 Cal.3d 592, 596, 517 P.2d 449, 111 Cal.Rptr. 369, *cert. denied,* 419 U.S. 825 (1974). Consequently, the determination to treat railroad retirement benefits as property is, by itself, unassailable.

988, 994 (1978)(citations omitted). The presumption places the burden on the party claiming preemption to demonstrate the clear congressional purpose. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-526 (1977).

Nowhere is the presumption in favor of state law more pronounced than in the field of domestic relations. "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *In re Burrus,* 136 U.S. 586, 593-594 (1890); *see Overman v. United States,* 563 F.2d 1287, 1290 (8th Cir. 1977); *In re Marriage of Pardee,* 408 F.Supp. 666 (C.D.Cal. 1976). This Court has explained the proper approach in this way:

> Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements. They should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such interests, will suffer major damage if the state law is applied.

United States v. Yazell, 382 U.S. 341, 352 (1966). Consequently, as a result of this strong presumption, "Congress generally drafts statutes in a way that avoids conflict with state domestic relations law, [and] courts interpret them with the presumption that Congress did not intend to interfere with the operation of that body of state law." *Stone v. Stone,* ..... F.Supp. ....., ..., 192 BNA PENSION RPTR. D-3, D-5 (N.D.Cal. 1978) (appeal pending).

Thus, the California Supreme Court's determination that railroad retirement benefits are community property

should be upheld by this Court in the absence of a clear and definitive showing that a federal policy is thwarted by that determination. Neither Petitioner nor the United States has made such a showing, for the provisions upon which they rely provide no concrete evidence as to congressional intention. At most, all that can be gleaned from the statutes and their history is a concern for retired railroad workers and their families; that there existed a congressional intent that divorced spouses of such workers should be effectively denied these benefits is not apparent. In this context, where "the intent of Congress . . . is not violated by application of California's community property laws, then the status of such rights is governed by California law." *In re Marriage of Hisquierdo,* 19 Cal.3d 613, 616, 566 P.2d 224, 139 Cal.Rptr. 590 (1977).

B. The Failure of Congress to Provide for a Divorced Spouse Through a Specific Benefit Evidences an Intent That State Concepts, Including Community Property Law, Would Take Precedence.

It is undisputed that the background of the Railroad Retirement Act of 1935, from which the 1974 Act followed, evidences an intent that the benefits would "provide enough to enable retired employees to enjoy the closing days of their lives with peace of mind and physical comfort." H.R.Rep. No. 1711, 74th Cong., 1st Sess., 10 (1935). From this starting point, however, the United States hypothesizes that to reduce the guaranteed amounts for the worker by the application of community property principles is contrary to that Congressional intent. While recognizing that "the 1935 Act did not expressly prohibit the reduction of worker's benefits by application of state community property

laws" (Am.Br. 14), the United States asserts that implicit in that effort was that the entire benefit should properly belong to the worker, with nothing accruing to the nonemployee spouse. In support of this contention of implicit intent, the United States and Petitioner point to the failure of Congress to create a specific annuity for divorced spouses. (Pet.Br. 14-16; Am.Br. 15-18.)

This argument runs counter to logic. With no express language on which to rely, the United States is forced to create a non-existent intent from vague legislative history and from the absence of a provision for which there is no explanation. The argument necessarily assumes that the purpose of the Act precluded consideration of nonemployee spouses. Under this approach, the purpose was simply to ensure the economic security of the worker, without regard to a spouse.[2] Any rational interpretation of the statutes and legislative history, however, indicates that Congress was concerned with the economic security of retired railroaders' spouses as well. Yet the end-point of the United States' rationale is that *any* diminution of the retiree's annuity, even

[2]The very fact that Congress decided to provide a spouse's benefit indicates its interest in the families of workers, as opposed to just the workers themselves. The House Report on that legislation underlines this concern and belies the United States' depiction of the Act as directed solely at railroaders themselves:

> For several years now the scale of the benefits to retired railway workers and their families has lagged far behind the steadily rising cost of living. This has produced a situation that cannot and should not be ignored any longer. The condition of some of these retired workers and their families, whom we seek to aid by increased benefits, is desperate. They need help and they need it now without further delay.

H.R.Rep. No. 976, 82d Cong., 1st Sess. (1951), in 1951 U.S. Code Cong. & Admin. News, 2529.

to support a present spouse, "would have been inconsistent with the Act's objectives." (Am.Br. 14.)

The fallacy of this argument is underscored by the suggestion that application of community property principles in this context is somehow different than that of support principles. The United States notes that forcing the retiree to give up one-half of the annuity attributable to the marriage years would threaten the worker's economic security, thus violating the purpose of the Act. But it is suggested at the same time that that same economic security would not be threatened where a court ordered alimony payments. (Am. Br. 14-15.) Inasmuch as alimony payments, or child support, might encompass as much as community property, it is difficult to see how this inference has been drawn.

The fact that it is an inference, and no more, is in large part accountable for its illogic. The United States describes the goals of the 1935 Act in terms which effectively exclude the nonemployee spouse from consideration, whether or not the marriage is still existent. Once that is accomplished, it is then a simple matter to suggest that the division of benefits under community property principles violates the Act, for it necessarily diminishes the amount available for the individual who has retired. This analysis of the goal of the Act is irrational. When Congress was creating the benefit program, it was considering the well-being of the workers' spouses, as well as that of the workers. Their economic security was also at stake; it was in part on their behalf that the railroader was working.

In an effort to bolster this approach, however, Petitioner and the United States both suggest that Con-

gress has spoken clearly—albeit, silently—by not providing annuities for divorced spouses. Again, the United States recognizes that a divorced spouse may share in retirement benefits anyhow, due to alimony, thus reducing the amount that the employee spouse has to live on, but the United States argues that the burden on the retired worker is greatly increased—and, apparently, qualitatively different—under the influence of community property principles. Division on that theory will "increase this 'divorce penalty' without any showing that a further reduction in a worker's available benefits is justified by the respective conditions of the parties." (Am.Br. 16.) Unfortunately, it is not explained how alimony payments and a community property division are distinguishable in this context. Both result in payment of part of the benefits to the nonemployee spouse, despite the fact that Congress specifically "declined to provide a (divorced) spouse's benefit. . . ." (Am.Br. 15.)[3]

Still, the United States concludes that the decision not to create a divorced spouse's benefit "reflect[s] a determination that the finite resources of the Railroad Retirement Fund should be expended for the benefit of retired workers and their children rather than divorced wives." (Am.Br. 18.) This analysis represents a failure to comprehend the most basic principles of

[3]No answer is forthcoming from the legislative history quoted in the United States' Brief at 16-17. That discussion focuses on whether benefits should go to a divorced spouse after the death of the employee spouse. There is no issue in this case regarding the payment of benefits after the death of the former employee. Furthermore, the reason offered in this testimony for not providing such benefits—that to do so would reduce payments to surviving children—has no relevance to this case, as there is no suggestion here that a higher combined benefit should be paid to a divorced couple than is paid to an individual former employee.

domestic relations. The logic suggests that nonemployee former spouses should be cut adrift economically as if they had contributed nothing to the marriage and were therefore completely undeserving. It also ignores the reality that, in most states, alimony would probably result in the divorced nonemployee spouse receiving a part of the "finite resources of the Railroad Retirement Fund." It is inconceivable that Congress would have suggested—implicitly or explicitly—that no part of the Railroad Retirement benefits could be paid to a divorced spouse as alimony. Yet, Petitioner and the United States argue that implicit in the congressional decision not to award a divorced spouse's benefit is an intent that these benefits should not be available through community property laws. In short, to the extent that there exists a "divorce penalty," it is no more reasonable to read an intent by Congress to preempt community property laws than it is to see an intent to preempt alimony laws.[4]

In attempting to devise an intent where there is none, the United States goes to great pains to explain a rationale which simply does not exist. The California Supreme Court has previously noted that a congressional concern for one class of possible recipients demonstrates little with respect to others. "It is not incongruous for Congress to supply a program to aid widows, who no longer have husbands to provide sustenance, and omit to do so for ex-wives who can rely on state family law concepts of support, alimony,

[4]"Community property laws are as integral a part of a state's domestic relations laws as its support laws, so the federal policy of noninterference with state domestic relations policy . . . applies to both kinds of law." *Stone v. Stone, supra,* ..... F.Supp., at ....., 192 BNA PENSION RPTR., at D-9.

and community property for a source of income." *In re Marriage of Fithian, supra,* 10 Cal.3d at 600. Relying on this common-sense approach, that court states in its opinion below that

> [i]t seems unlikely that Congress proposed to leave a divorced spouse without any assistance whatever stemming from the employee's entitlement to a pension during marriage. Rather, . . . the fact that Congress made no provision for a former spouse in the act is more rationally explained by its reliance upon state property law to protect an ex-wife's interest in the railroad employee's annuity.

19 Cal.3d at 618. As non-wage-earning spouses have traditionally relied upon state law on divorce, it seems undeniable that Congress would have deprived them of that opportunity only through an explicit effort, and not in the backhanded, passive manner that the United States and Petitioner here suggest.[5]

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[5]Although Amicus NOW LDEF embraces neither the results nor the rationale, there is at least some logic in two decisions by the California appellate courts which apply the inverse of the *Fithian* rationale to Social Security benefits. In *In re Marriage of Nizenkoff,* 65 Cal.App.3d 136, 140, 135 Cal.Rptr. 189 (1976), the Court of Appeal wrote: "As Congress expressly provided for the interests of a divorced wife in the social security system, it did not intend that they rely on state family law concepts of support, alimony and community property." *See also In re Marriage of Kelley,* 64 Cal.App.3d 82, 99, 134 Cal.Rptr. 259 (1976). In the social security scenario, therefore, Congress has taken an active role with respect to the provision of benefits to a divorced spouse. It would still not appear to be sufficient to preempt state community property laws, but at least it represents a positive statement. In the railroad retirement situation, however, Congress has said nothing regarding benefits for divorced spouses, and it therefore is a leap of faith to infer that the intent was to deprive them of any railroad benefits, even through the operation of state law principles. Indeed, if that logic is carried to its conclusion, then just as a nonemployee former spouse should receive no railroad retirement benefits, either through the Act or by the operation of state law, then so should nonemployee former spouses of a Social Security-covered individual receive *both* divorced benefits under the Social Security Act and a community interest in the employee spouse's own Social Security benefits. The comparative injustice of that result indicts the logic as well.

Petitioner and the United States thus construct a convoluted reading of congressional intent which results in the eradication of a property interest guaranteed by state law. Logic, however, compels the opposite conclusion, that by excluding divorced benefits, Congress sought to leave the protection of divorced individuals' interests to state law principles. Given the strong presumption in favor of state domestic policy, it seems inconceivable that Congress' silence on divorced spouse benefits represents an intention that they receive nothing. Had Congress meant to take such a drastic step—the preemption of state domestic policy with no replacement mechanism—it surely would have spoken directly to the issue. *See, e.g., infra,* at p. 28, n.12.

II

NO FEDERAL LAW PRESENTS A DEFINITIVE MANDATE FOR PREEMPTION OF COMMUNITY PROPERTY LAWS.

Both the United States and Petitioner reserve a substantial portion of their arguments for the contention that the anti-assignment provision of the Act, 45 U.S.C. §231m, in conjunction with recent Social Security Act provisions creating exceptions to that section, represents the definitive statement of Congress supporting preemption. Specifically, they argue that the anti-assignment clause, which includes a provision that benefits may

not be anticipated, is a direct attack on the provision of retirement benefits to a nonemployee spouse under community property principles. "Community property divisions of benefits, whether called 'assignments' or 'anticipations' of benefits, would fall within the scope of this prohibition." (Am.Br. 18.) But as the California Supreme Court pointed out, the "purpose of [§231m] is to assure that railroad annuities not yet paid to the beneficiary are exempt from the claims of creditors." 19 Cal.3d at 617. Neither that section itself, nor the cited provisions of the Social Security Act, can support the argument that community property laws have been preempted by this provision. An analysis of these provisions and of community property law demonstrates the fallacy of the argument.

A. The Anti-Assignment Provision Was Established Solely to Protect Recipients of Government Retirement Benefits From the Demands of Creditors.

The anti-assignment clause was part of the original Railroad Retirement Act. The legislative history does not specify a purpose, other than that it was intended to ensure "that no annuity payments shall be assignable or shall be subject to any tax or legal process." H.Rep. No. 1711, 74th Cong., 1st Sess., 12 (1935). The goal, however, appears to be self-evident: to insulate families' retirement funds from the grasp of creditors. *See Freedom Finance Co. v. Fleckenstein,* 116 N.J. Super. 428, 282 A.2d 458, 460 (1971). Similar provisions exist in virtually every government benefit program;[6] one has recently been applied as well to private

[6]*See, e.g.,* 38 U.S.C. §3101(a) (Veterans benefits); 10 U.S.C. §1440 (military retirement benefits); 42 U.S.C. §407 (Social Security benefits); 5 U.S.C. §8246(a) (Civil Service Retirement benefits).

pension benefits. 29 U.S.C. §1056(d). The policy behind exempting such benefits from creditors goes back at least to 1873, when Congress first exempted veterans' benefits from creditors' claims as well as from taxation. *Porter v. Aetna Casualty and Surety Company,* 370 U.S. 159, 160 & n.2 (1962).

The cases are replete with references to the purposes of these anti-assignment provisions as intending to protect retirees from creditors. "[L]egislation of this type should be liberally construed . . . to protect funds granted by the Congress for the maintenance and support of the beneficiaries thereof . . . ." *Porter v. Aetna Casualty and Surety Company, supra,* 370 U.S. at 162; *see also Philpott v. Essex County Welfare Board,* 409 U.S. 413 (1973); *In re Vary,* 65 Mich.App. 447, 237 N.W.2d 498 (1975), *aff'd* 401 Mich. 340, 258 N.W.2d 11 (1977); *Stone v. Stone, supra,* .... F.Supp. at ...., 192 BNA PENSION RPTR., at D-6. At the same time, by protecting beneficiaries from creditors, Congress did not suggest that dependents of the beneficiaries, for whom the protection was in part created, *see In re Vary, supra,* 237 N.W.2d at 500, would be treated as similar to creditors and left to fend for themselves. "It would be ironic indeed if a provision designed in part to ensure that an employee spouse would be able to meet his obligations to family after retirement were interpreted to permit him to evade them with impunity after divorce." *Stone v. Stone, supra,* .... F.Supp. at ...., 192 BNA PENSION RPTR., at D-6. It is myopic to assume that the purpose of these anti-assignment provisions was to insulate recipients from their families as well as from creditors; just as these benefits were expected to protect beneficiaries and their families before divorce.

they should be similarly interpreted after the couple has separated.

Yet the United States argues that the community property interest of a spouse is essentially no different than the interest of a creditor. (Am.Br. 20-21.) It rejects the California Supreme Court's evaluation which distinguishes a creditor from a community property "owner with a 'present, existing, and equal interest.'" *In re Marriage of Hisquierdo, supra,* 19 Cal.3d at 616, quoting *Phillipson v. Board of Administration,* 3 Cal.3d 32, 44, 473 P.2d 765, 89 Cal.Rptr. 61 (1970). This analysis, the United States contends, merely "beg[s] the question," (Am.Br. 20-21); in fact, it is at the crux of the issue, for the nature of the interest of a divorced spouse is precisely what is at stake in this case. A brief analysis of community property law is necessary in order to understand how the anti-assignment provisions are inapplicable.

B. A Community Property Interest Is Not Like That of a Creditor.

One commentator describes community property to include

> all property which stems from the labors of either spouse during the marriage, irrespective of direct contributions to its acquisition or the condition of title. . . . The spouses are seen as contributing equally to acquisition regardless of the actual division of labor in the marriage and regardless of which spouse actually "earned" the property.

Prager, *The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975,* 24 U.C.L.A. L.Rev. 1, 6 (1976) (footnote omitted).

Another sees the rights of the nonemployee spouse as arising "from the fundamental principle of community property law that both spouses participate in the community and both are entitled to share in its rewards." Note, *Dividing the Community Property Interests In Nonvested Pension Rights,* 65 Calif.L.Rev. 275, 279 (1977). By statute in California, "the respective interests of the husband and wife in community property during continuance of the marriage relationship are *present, existing and equal interests.*" Cal. Civ. Code §5105 (emphasis supplied). As early as 1859, the California Supreme Court described the principle in these terms:

> [T]he marriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution. . . . All property is common property, except that owned previous to marriage or subsequently acquired in a particular way. The presumption, therefore, attending the possession of property by either, is that it belongs to the community. . . .

Myer v. Kinzer, 12 Cal. 247, 251-252.[7]

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[7]*See also* Verrall & Sammis, *California Community Property,* at 3; Note, *Retirement Pay: A Divorce In Time Saved Mine,* 24 Hast.L.J. 347, 354 (1973).

The California approach is similar to that of the seven other states which apply community property principles. "Under the usual provisions of the statutes in the community property states, all property which is acquired during the existence of the marriage relation, other than that which the statutes specifically designate as separate because of a particular manner of acquisition, is community property. . . ." 41 C.J.S., "Husb. & Wife," §471(a), at 471. *See* Ariz.R.S. §25-211; *Mortensen*

(This footnote is continued on next page)

Community property is therefore not comparable to a creditor's interest. It is an interest which comes into existence at the time that the work or service is performed. The spouse who has not worked has an interest in the property from the beginning, not at some arbitrary date in the future when the property is actually divided. This is a key distinction from alimony, which is a discretionary award by the court in order to insure that the spouse with a lesser income is properly cared for after the separation. *In re Marriage of Brown, supra,* 15 Cal.3d at 848-849. Community property, by contrast, "should be [the spouse's] as a matter of absolute right." *In re Marriage of Peterson,* 41 Cal.App.3d 642, 651, 115 Cal.Rptr. 184 (1974), as quoted *id.,* at 848.[8]

In California, creditors receive special treatment. Attachments may be issued against an individual, for instance, "only on a claim which arises out of the conduct of the individual of a trade, business, or profession." Cal. Code Civ. Proc. §483.010. As that provision's legislative comment notes, its purpose was to "limit attachment to cases arising out of commercial transactions." Attachment would thus not be authorized to secure a community property interest. Consequently,

v. Knight, 81 Ariz. 325, 305 P.2d 463 (1946); Idaho C. §32-906; *Ramsey v. Ramsey,* 96 Idaho 672, 535 P.2d 53 (1975); La. Civ.C. §2398; *Succession of Hyde,* 281 So.2d 136 (La.App. 1973), *aff'd* 292 So.2d 693 (La. 1974); N.R.S. §123.220; N.M.R.S. §57-4A-6(A); *LeClert v. LeClert,* 80 N.M. 235, 453 P.2d 755 (1969); Tex.F.C. §5.01; Wash.R.C.A. §26.-16.030; *Graham v. Radford,* 71 Wash.2d 752, 431 P.2d 193 (1967).

[8]Additionally, it should be noted that in all community property states except Louisiana, the wife has the right to manage the community property during marriage, a right which a creditor surely never has. K. Davidson, R.B. Ginsburg, H.H. Kay, *Sex-Based Discrimination Text, Cases and Materials,* 164-169 (1974), supplement by R.B. Ginsburg and H.H. Kay (1978).

the United States' argument that the California Supreme Court was begging the question with its distinction between a community property interest and a creditor's interest is, in fact, the unrealistic approach. The interest of the nonemployee spouse, unlike that of a creditor, is exactly the same as the interest of the working spouse. Both have the same rights with respect to the income, and both obtain those rights at the same time. The nonemployee spouse does not suddenly become possessed of her interest in the community property on the date that the divorce court divides that property; the interest has always existed, and she is merely attempting to vindicate a property interest which is and always has been her own. Consequently, the interest of the nonemployee spouse, just like the interest of the other, exists prior to the operation of any anti-assignment statutes; that interest is no more an assignment of the benefits of the employee spouse than could the interest of the employee spouse be considered an assignment of the benefits of the other. The nonemployee spouse is not laying claim to the property of the employee spouse; she is seeking to have the court designate exactly what that property is.

Thus, the definition of this interest as a community interest is a significant aspect of this issue. Lying behind these definitions, however, are the policy considerations which demand that a nonemployee spouse's community property interest not be treated like a creditor's interest.[9] The primary policy factor lies in the

[9]In *Stone v. Stone, supra,* Judge Renfrew recently considered this same issue with respect to the anti-assignment provision of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1056(d). While determining that the definitional distinction between a community interest and

(This footnote is continued on next page)

purpose of the anti-assignment provision, which is, as previously noted, to ensure that former railroaders and their families have income protected from creditors. It seems incredible that Congress, which provides a benefit for railroaders' spouses, 45 U.S.C. §231a(c)(1), would completely disregard those spouses after divorce. Rather, since Congress has not chosen to provide a divorced spouse's benefit, it is apparent that Congress contemplates that the benefits will continue after divorce in the form of community property. Judge Renfrew's analysis in *Stone* is equally compelling in this context: "Construing [ERISA's anti-assignment provision] to prevent a nonemployee spouse from enforcing marital property obligations against an employee benefit plan covered by ERISA would frustrate rather than further the policies of that provision." ..... F.Supp., at ....., 192 BNA PENSION RPTR., at D-6.

The community property interest of a divorced spouse is different than that of a business creditor. Whereas the latter is never protected by an anti-assignment provision, the former has the protection during the period of the marriage; the mere termination of the marriage should not defeat the purposes behind the anti-assignment provision, and prevent the nonemployee spouse from obtaining a portion of the property which, previously, had been protected by the provision. Also, the employee spouse is in a considerably more vulnerable position than is a creditor. More than a creditor, that spouse is likely to be dependent on the benefits, for the creditor will probably have "a variety of cus-

a creditor's interest did not alone resolve the problem, he found that the policy considerations underlying the distinction precluded application of ERISA's anti-assignment provision to a community property interest. ..... F.Supp., at ....., 192 BNA PENSION RPTR., at D-6 through D-9.

tomers who own a variety of assets which can be used to satisfy their debts. The nonemployee spouse has a unique and protected interest in obtaining her fair share of pension benefits." *Id.*, ... F.Supp., at ....., 192 BNA PENSION RPTR., at D-6. Furthermore, unlike a creditor, that spouse has not taken a business risk by extending credit to someone who is not in a position to repay. Instead, the spouse has merely been cut adrift economically, and regardless of whose "fault" the divorce may have been, he or she should not be treated as if a business effort had failed.

Petitioner and the United States argue that the treatment of these benefits as community property will result in great loss to retired railroaders. Their arguments, however, strongly imply that it is appropriate that the nonemployee spouse be reduced to a life of poverty so that the retiree will not be inconvenienced. This approach assumes, of course, that his right to a decent income is greater than his former wife's—presumably because he did the actual labor.

> [B]ut his claim is not superior to his wife's. Although the employee spouse may have assumed the obligation to provide the money to support the couple, the nonfinancial contributions of a nonemployee spouse are no less essential or valuable to a marriage, and ERISA does not reject the basic premise of the community property laws that each partner in a marriage deserves an equal share of all marital assets because each made their acquisition possible.

Id., ... F.Supp., at ....., 192 BNA PENSION RPTR., at D-7.

Community property principles recognize the contributions of the nonemployee spouse. From that recognition, it necessarily follows that the nonemployee spouse will be treated equally with the retired railroader. To ignore those principles is to reward the husband who divorces his wife at the end of his working life; despite her efforts, she receives nothing, while the husband will have all of the benefits. The alternative is the only just treatment of these benefits. Preemption of the "community property laws would protect a small and relatively undeserving minority of employee spouses at the expense of a large and relatively deserving majority of nonemployee spouses." *Id.*, ... F.Supp., at ....., 192 BNA PENSION RPTR., at D-7 (footnote omitted).

C. The Congressional Decision to Waive the Government's Sovereign Immunity in Order to Permit the Garnishment and Attachment of Federal Benefits and Pay for Purposes of Child Support and Alimony Does Not Dictate Preemption of a State's Community Property Laws.

The United States also attempts to demonstrate that, all else being equal, the preemption of the community property laws by the anti-assignment provision is supported and required by the exception to that provision and its definitional amendment. (Am.Br. 18-20). It is asserted that section 459 of the Social Security Act, 42 U.S.C. §659, which allows for garnishment of government benefits to satisfy alimony and support orders, and the clarifying section added three years later, 42 U.S.C. §662(c), which explicitly excludes community property from the definition of alimony and support, represents the specific Congressional state-

ment that state community property laws should be preempted. An evaluation of the history and purpose of these sections, however, does not indicate any definitive Congressional purpose with respect to this issue; rather, it demonstrates only that Congress may view community property in a different light than it does support and alimony. Contrary to the government's contention, however, that viewpoint could as easily be a recognition that community property is an existing ownership interest, thus rendering an anti-assignment provision irrelevant.

Section 459 of the Act was a late addition by the Senate to H.R. 17045, the Social Services Amendments of 1974. It was lifted from a similar Senate effort of the previous year.[10] Its history demonstrates that Congress was not the least concerned with the issue which is the subject of this case. Rather, the provision was an aspect of a broad attack on the problem of absent fathers, who, while avoiding their support responsibilities, were forcing the state and federal governments to support their families through the Aid to Families with Dependent Children ("AFDC") program.

> The problem of welfare in the United States is, to a considerable extent, a problem of the non-

[10]H.R. 17045 was introduced on October 3, 1974, 120 Cong.Rec. 33737 (daily ed., Oct. 3, 1974), and passed by the House two months later. 120 Cong.Rec. 38614-38619 (daily ed., Dec. 9, 1974). The Senate then made a number of amendments, including the addition of the provision from the last session. The Senate Finance Committee's discussion of the 1973 provision was adapted virtually unchanged as the Report on the 1974 provision. *Compare* S.Rep. 93-553, 93d Cong., 1st Sess., at 39 ff., *with* S.Rep. 93-1356, 93d Cong., 2d Sess., in 1974 U.S. Code Cong. & Admin. News, at 8145 ff. For the remainder of this discussion, reference will be made only to the latter authority.

> support of children by their absent parents. . . . The Committee believes that all children have the right to receive support from their fathers. The Committee bill . . . is designed to help children attain this right. . . .

1974 U.S. Code Cong. & Admin. News, at 8145-8146.

One resolution was to allow the garnishment and attachment of pay and benefits of present and former federal employees. Unfortunately, the garnishment of these monies was viewed as a violation of the government's sovereign immunity, *id.*, at 8156; *see Applegate v. Applegate,* 39 F.Supp. 887, 889-890 (E.D.Va. 1941). It was, therefore, in response to this "statutory barrier to collecting from military personnel and Federal employees" that the provision was enacted. 1974 U.S. Code Cong. & Admin. News, at 8147. Congress was not concerned with the anti-assignment provisions, but with the larger problem of collecting from recalcitrant parents, primarily fathers, who were receiving federal pay or benefits for themselves and simultaneously forcing the public to support their wives and children.

Section 459 had a limited purpose. It did not create a right to garnishment; it "simply abrogate[d] the Government's immunity to the realization of this right if such a right exist[ed] under state law." *Wilhelm v. U.S. Dept. of Air Force, Accounting and Finance Center,* 418 F.Supp. 162, 164 (S.D.Tex. 1976).[11] It was intended merely as a way to force the United States to "respond to garnishment as a private person for

[11] *See also Marin v. Hatfield,* 546 F.2d 1230, 1231 (5th Cir. 1977); *Popple v. United States,* 416 F.Supp. 1227, 1228 (W.D.N.Y. 1976); *Bolling v. Howland,* 398 F.Supp. 1313, 1316 (M.D.Tenn. 1975).

similar legal process and only to that extent." *Overman v. United States, supra,* 563 F.2d at 1292. It was directed not merely at retirees, but at all recipients of federal funds who would otherwise be able to misuse governmental immunity. The retirees were merely a portion of those who fit into this category.

The effect of section 459 on various anti-assignment provisions was a necessary by-product of the larger effort—elimination of the immunity. There is virtually no discussion in the legislative history of this aspect of the provision. In both the "original" legislative history, S.Rep. 93-553, and its descendant, S.Rep. 93-1356, one lone sentence appears at the end of the analysis, noting this result: "[Section 459] would also override provisions in various social insurance or retirement statutes which prohibit attachment or garnishment." 1974 U.S. Code Cong. & Admin. News, at 8157.

Despite the Senate's changes, the Social Services Amendments of 1974 moved swiftly through Congress, apparently in an effort to pass it before the term ended. The Senate reported the House bill back with amendments on December 14, 1974, 120 Cong.Rec. 39916 (daily ed., Dec. 14, 1974), and passed it three days later. 120 Cong.Rec. 40358 (daily ed., Dec. 17, 1974). A joint conference was immediately appointed, which produced a report, H.R.Rep. 93-1643, in two days. That report was discussed in the House the next day, and the discussion indicates that Rep. Ullman, one of the sponsors of the bill, was anxious to ensure that the House would pass the bill with the Senate amendments because of his belief that the government was spending large amounts of money supporting families whose fathers were paid by the federal government.

One representative, however, expressed some concern as to the breadth of the immunity waiver. After reading it aloud, Rep. McFall stated: "Child support I can understand. Alimony payments is a rather drastic addition." Rep. Ullman responded: "I think this Congress is going to have to face up to a very serious deteriorating situation where the government is paying out money to individuals who are not living up to their family responsibilities. . . ." 120 Cong.Rec. 41809 (daily ed., Dec. 20, 1974).

This exchange is the closest that anyone came to a discussion of the provision's impact in this area. It indicates that even in the rush to pass the bill, there was some concern that Congress was doing too much too quickly. It suggests something else, however: if Congress had decided to limit the effect of the provision only to child support, as Rep. McFall suggested, would that limitation now be interpreted by the United States to mean that section 459 represented a legislative decision that alimony was preempted by federal law in the same way that it is here argued that community property has been preempted?

That rhetorical inquiry should indicate the weakness of the United States' position. Effectively, the United States suggests that a bill, the purpose of which was to eliminate sovereign immunity in specific situations, is the strong congressional statement that state community property laws were preempted by the Railroad Retirement Act. It is a connection which is tenuous at best.[12] Congress had something completely different in mind—the end of public support, through the AFDC

[12]That Congress is perfectly capable of speaking directly to preempt community property interests is evidenced by the Internal Revenue Code, *see* I.R.C. §§219(c)(2), 911(c)(3),

program, of families in which a federally-paid parent had abdicated all responsibility—and, to accomplish this, it was necessary to pass a provision waiving the government's sovereign immunity. As a necessary by-product of that, the anti-assignment provisions had to be abrogated as well, but it was hardly a key aspect or consideration of the bill.

To the extent that an approach to community property can be read into section 459, it is equally reasonable to suggest that Congress viewed community property as not relevant to this issue. If community property is properly recognized as an ownership interest, rather than as the court-created debtor interest in the property of another that alimony and child support amount to, then it seems reasonable to presume that Congress recognized that an exception to the anti-attachment provision would not be applicable to community property. How could an individual garnish or attach property which already belonged to her?

Ultimately, one can only speculate as to the congressional intent with respect to the effect of the anti-attachment provisions and section 459 on community property. The suggestion of the previous paragraph, however, is no more speculative than that suggested by Petitioner and the United States: that Congress was decisively stating that railroad retirement benefits were not subject to division under community property principles. Congress was concerned with sovereign immunity and support problems. It moved with great haste to resolve those issues, but in doing so, it did not speak to the issues of this case.

43(c)(2)(B)(ii), 1303(c), 1304(c)(3)(B), and 6013(e)(2)(A), as well as in the Social Security Act itself, *see, e.g.*, 42 U.S.C. §411(a)(5)(A). *See also* 20 C.F.R. §404.350(d) (1977).

The United States also contends that the recent clarifying amendments to section 459, codified at 42 U.S.C. §652, provide further support for its analysis. "It is apparent from the terms of Public Law 95-30 [42 U.S.C. §652] . . . that Congress intended to distinguish between payments necessary for 'support' and payments based on the economic efforts of the parties during marriage." (Am.Br. 20.) But subsection (c) of those amendments, which contains the definition of "alimony" that explicitly excludes "community property" from that term for purposes of 42 U.S.C. §659, adds little to an understanding of these sections. Rather, it simply underscores what Congress had intended all along, that support for a divorced spouse would be garnishable from federal benefits, whereas community property, which is a recognition of an existing property interest, would not be included within this exception to the government's sovereign immunity.

The discussion on the Senate floor illustrates this point. In addition to the statement of the bill's sponsor, Senator Nunn, as quoted by the United States (Am.Br. 19), this exchange between Sens. Nunn and Curtis took place:

> MR. CURTIS: These amendments are in the nature of refining amendments to that which is already in the law, is that correct?
>
> MR. NUNN: That is correct; yes.
>
> MR. CURTIS: To implement that which has already been done?
>
> MR. NUNN: That is right, particularly the garnishment section on Federal employee wages.

123 Cong.Rec. S6723 (daily ed., April 29, 1977). In short, the definitional amendmnets, from which the

United States derives such significance, were no more than an effort to put in explicit terms that which had already been stated in broader terms. It did not alter the thrust of section 459; it only made clear that section 459 was applicable specifically to alimony and child support payments, and not to community property. This had always been true; it simply had not been specifically stated.

Pub.L. 95-30 reiterated the importance of eliminating the sovereign immunity defense so that federal benefits could be attached and garnished.[13] It did not represent the definitive congressional statement that community property laws should be preempted by the anti-attachment provisions of the Railroad Retirement Act. It merely focused on the problem that Congress was attempting to resolve, so that the courts would not read more into section 459 than had been intended. Statutes waiving sovereign immunity are to be strictly construed, *McMahon v. United States,* 342 U.S. 25, 27 (1951), and suits should be allowed only when that immunity has been clearly waived. *McMahon v. United States, supra; Flora v. United States,* 357 U.S. 63, 65 (1958); *United States v. Sherwood,* 312 U.S. 584 (1941). Congress was apparently concerned that courts would allow a broader waiver of this immunity than had been intended.[14] This specification of the limits of

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[13]"[T]he question of whether such moneys will be subject to legal process will be determined in accordance with State law in like manner as if the United States were a private person." 120 Cong.Rec. S6727 (daily ed., April 29, 1977).

[14]After section 459 was passed, courts were in disagreement as to whether community property interests were garnishable. *Compare, e.g., Williams v. Williams,* 338 So.2d 869 (Fla. App. 1976); and *United States v. Stelter,* 553 S.W.2d 227 (Tex.Ct.Civ.App. 1977) (allowing garnishment of community

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waiver, however, did not amount to a determination that a community interest in retirement benefits was comparable to a creditor's interest.[15] It only clarified the congressional intent which lay behind the passage of section 459 several years earlier.

III

PRIOR SUPREME COURT DECISIONS DO NOT SUPPORT PREEMPTION OF COMMUNITY PROPERTY PRINCIPLES IN THIS INSTANCE.

Petitioner and the United States rely on two decisions from this Court which determined that state community property principles were preempted by federal law. These cases, *Wissner v. Wissner*, 338 U.S. 655 (1950), and *Free v. Bland*, 369 U.S. 663 (1962), actually support Respondent's position, however, for they demonstrate the necessity of a clear federal mandate to preempt state domestic policy.

In *Wissner*, a soldier had purchased a National Service Life Insurance policy, naming his mother as beneficiary. When he died in the service in 1945, his wife sought the proceeds of the policy; the California courts awarded her one-half of those proceeds as the community property interest. In a 5-3 decision, however, this Court determined that the National Service Life Insurance Act, 38 U.S.C. §801 *et seq.*, preempted

property interests) *with Kelley v. Kelley*, 425 F.Supp. 181, 182 (W.D.La. 1977) ("Plaintiff is claiming a property right, while the immunity surrendered under 42 U.S.C. §§652-660 deals only with child support and alimony."); and *Marin v. Hatfield*, 546 F.2d 1230 (5th Cir. 1977) (disallowing garnishment of community interests). Consequently, to resolve this apparent confusion, Congress passed 42 U.S.C. §662(c), which was merely a summary declaration of pre-existing law.

[15] *But see Stone v. Stone, supra,* ..... F.Supp. ....., at ....., 192 BNA PENSION RPTR., at D-8 (*dictum*).

state community property principles. The decision rests on a recognition of the overall purposes of the Act, on the existence of a specific section for the naming of a beneficiary, and on an anti-assignment provision. 338 U.S., at 658-660.

First, the Court determined that a "liberal policy toward the serviceman and his named beneficiary is everywhere evident in the comprehensive statutory plan." *Id.*, at 658. In the instant case, however, it has already been demonstrated that no such policy exists; to the contrary, the apparent purpose of the Railroad Retirement Act is to ensure that both retired workers and their families are adequately protected in retirement. Loss of the nonemployee spouse's interest would run counter to that policy.

Secondly, and most importantly, *Wissner* is dependent on a specific provision in the Act which allowed the serviceman to designate his beneficiary. Congress spoke "with force and clarity in directing that the proceeds belong to the named beneficiary and no other." *Id.*, at 658. It is this section which most distinguishes *Wissner* from the instant situation. Here, congressional intent has been vague at best, and there is no specific statement that Congress sought to deprive nonemployee spouses of the benefits to which they, as partners in the marriage, gained entitlement. As the California Supreme Court stated:

> [T]he fundamental premise of *Wissner* was that Congress intended a serviceman to have an absolute right to change his beneficiary and that to require the designated beneficiary to pay over the proceeds of the policy to the widow would frustrate that intent.

In re Marriage of Hisquierdo, supra, 19 Cal.3d at 618. In the absence of such a specific requirement, there is no basis on which to find a federal preemption.

As further support for its position, this Court found that the anti-attachment provision of the National Service Life Insurance Act conflicted with the spouse's community interest. Again, though, that is distinguishable from this case, as the remainder of that statute was adamantly clear that the proceeds of the policy were for the named beneficiary alone, so that the anti-assignment provision was in part designed to ensure that that individual alone would receive the entitlement.

In addition, there is a considerable difference between life insurance proceeds and retirement benefits. In the former situation, there is no guarantee that there will be any return at all; it is more in the nature of gambling. Furthermore, the input which generates that return is merely that small portion of the couple's community property which is used to buy the policy. In the instant situation, however, both the investment and return are of a different character. The return, a retirement annuity, is not premised on a speculative condition such as the death of the insured. It is more akin to deferred compensation, and although railroad retirement benefits have not been found by this Court to be contractual, there is a degree of certainty that those benefits will be forthcoming if the work is performed. Similarly, the "investment" is one of a lifetime, performed by both parties to the marriage. The working spouse, of course, makes a direct investment in those benefits, and the nonemployee spouse renders the contribution of the other possible. Retirement benefits, thus, are payment for the lifetime

efforts of the couple; life insurance benefits, especially during a war, more resemble a lottery pay-off. In *Wissner,* an important national policy was upheld by permitting soldiers to name their beneficiary and be certain that that beneficiary would receive the proceeds, but in this instance, a lifetime of contribution to a marriage is forfeited if the community interest is not recognized. It is a significantly greater loss than that sustained in *Wissner.*

Consequently, it is logical, especially in light of the provision specifically designating a beneficiary, to ensure that creditors could not obtain any of the proceeds of a policy. In the *Wissner* situation, the wife more resembled a creditor, as she was attempting to recover the return from the investment of a small part of her community property interest. In this instance, though, she is seeking something more significant: the return from the full contributions of married life. This Court noted that "the community property principle rests [in part] upon . . . the moral obligations of supporting spouse and children," 338 U.S., at 660; that obligation would appear to require that a husband not be relieved of his responsibility by eliminating his wife's community interest. The anti-attachment provision in *Wissner* could legitimately be read to ensure that a beneficiary received the full proceeds that the serviceman intended. But to read a similar intent in the Railroad Retirement Act's comparable provision would be to give the husband a windfall and to deprive the wife of any return from her years of investment.

Finally, one other aspect of *Wissner* deserves mention. The National Service Life Insurance Act was created to "enhance the morale of the serviceman"

during the war years. *Id.*, at 660. The program was a "legitimate [end] within the congressional powers over national defense." *Id.*, at 660-661. In short, *Wissner* must be read in terms of the national crisis which existed at the time that the Act was promulgated, a time when government held special powers to take extraordinary measures to protect the country. As one commentator has described it, "*Wissner* is a case of congressional preemption of state community property laws by exercise of the federal war and defense powers." Reppy, *Community and Separate Interests in Pensions and Social Security Benefits after Marriage of Brown and ERISA*, 25 U.C.L.A. L.Rev. 417, 487 (1978). Such an overriding federal concern does not exist in the instant situation;[16] instead, the concern appears to be with the well-being of retirees and their families.

In short, the *Wissner* decision was directed at an aspect of a national emergency, and recognized that the selection of a beneficiary was one means of helping to resolve this emergency. There was a specific provision allowing the individual who had determined to buy the policy to direct who would receive it, and a more general policy to encourage servicemen to choose their beneficiary. None of these elements exists in this case.

Free v. Bland, supra, involved merely the testamentary power of a wife. A Texas couple purchased United States Savings Bonds, which, under federal regulations, were issued in joint tenancy. The regulations specifically detailed the right of full ownership in the surviving spouse, 369 U.S., at 667-668 & nn. 5, 6, but the wife's son, to whom she had left her community prop-

[16]*See Carlson v. Carlson,* 11 Cal.3d 474, 479, 521 P.2d 1114, 113 Cal.Rptr. 722 (1974), *cert. denied,* 419 U.S. 1105 (1975).

erty interest, sued for that portion of the bonds. This Court determined that the "clear purpose of the regulations is to confer the right of survivorship on the surviving co-owner," *id.*, at 668, thus preempting state community property law and depriving the wife of her testamentary right. The Court noted, as in *Wissner,* that there was a legitimate purpose in having the bonds issued in joint tenancy, as it provided a "convenient method of avoiding complicated probate proceedings," rendering the bonds an "inducement" to help manage the national debt. *Id.*, at 669.

Again, this decision indicates the weakness of the United States' argument in the instant case. Not only was the preempting provision one means of fulfilling a national policy, but it was a specific provision, detailing clearly that "the survivor will be recognized as the sole and absolute owner." 31 C.F.R. §315.61, as quoted *id.*, at 667 n. 5. By contrast, the policy in this case is not directed at ensuring that the working spouse must receive the benefits of his working years, since the Act was designed to assist the families of workers as well. Furthermore, there is no specific provision in the Act comparable to the Treasury Department regulation which explicitly denominated that the survivor receive the bonds.[17]

[17]In a case considering the same regulations, this Court upheld the community interest while emphasizing the importance of state law in evaluating claims which would result in the loss of that interest. The Court said:

> [I]n applying the federal standard we shall be guided by state law insofar as the property interests of the widow created by state law are concerned. It would seem obvious that the bonds may not be used as a device to deprive the widow of property rights which she enjoys under Washington [community property] law and which would not be transferable by her husband but for the survivorship provisions of the federal bonds.

Yiatchos v. Yiatchos, 376 U.S. 306, 309 (1964).

These two decisions involve situations considerably different than that in this case. There is no provision which clearly and concisely delineates the husband in this instance as the sole recipient of the retirement benefits. Unlike in *Wissner* and *Free*, the nonemployee spouse will be deprived of the fruits of her labor; it is a loss considerably greater than those experienced in *Wissner* and *Free*. No national policy is furthered by depriving the nonemployee spouse of her interest, and state policy is specifically countered. *Wissner* and *Free* support Respondent's position; Congress has not here spoken with "force and clarity."

IV

PREEMPTION WILL PROVIDE RETIRED WORKERS WITH AN UNNECESSARY WINDFALL AT THE EXPENSE OF THEIR NONEMPLOYEE SPOUSES.

Petitioner suggests finally (Pet.Br. 19-20) that equitable considerations mitigate in his favor. In fact, justice can only be effected by permitting California to apply its community property rules. Otherwise, Respondent will be left solely dependent on alimony as a source of income. Regardless of whether this meets her basic needs, there is no reason that she should receive a lesser portion than does her husband. Furthermore, in at least one community property state, Texas, alimony cannot be awarded "for the wife after a judgment of divorce has been entered." *Francis v. Francis*, 412 S.W.2d 29, 32 (Tex. 1967); Vernon's Ann.Tex.Civ. Stat., Art. 2328b-1, Sec. 2(6), Art. 2328b-3, Sec. 7. In that state, therefore, if these benefits are not

subject to a community property division, nonemployee spouses will be left to depend solely on public assistance, while their husbands will have the full amount of railroad benefits.

Petitioner supports his equitable argument by noting that, in this particular instance, his wife will have Social Security benefits based on her work record, and suggests that to provide her with half the couple's railroad retirement benefits would work a grave injustice. (Pet.Br. 20.) This position, however, ignores a key point. Under the Social Security Act, husbands are entitled to a divorced spouse's benefit. 42 U.S.C. §402(b)(1)(G); *Oliver v. Califano*, CCH UNEMP. INS.REP. ¶15,244 (N.D.Cal. 1977).[18] Consequently, Petitioner will be eligible for a divorced spouse's Social Security benefit in addition to his portion of the couple's railroad retirement benefits. The suggestion that he will be left in virtual poverty, while his wife will have benefits from multiple sources, is without merit.

By contrast, preemption of her interest would have extraordinarily inequitable results. In this particular case, she would at least have Social Security benefits,

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[18]In *Oliver*, the district court found that the differential treatment of male and female divorced spouses, with the former required to demonstrate that at least half of his support was derived from his wife in order to be eligible for benefits, 42 U.S.C. §402(c)(1)(C), was a denial of equal protection. Consequently, the one-half support requirement has been judicially eliminated so that a divorced husband is now automatically entitled to benefits based on his wife's Social Security covered employment. *Oliver*, a class action, was not appealed. As of January 1, 1979, the requisite 20-year marriage period will be reduced to ten years. Pub.L. 95-216, §337(c) (December 14, 1977).

but he would have all of the railroad benefits plus a divorced spouse's Social Security benefit. The particular facts of this case should not be controlling, however, for there will be many more couples in which the wife will have no work record of her own on which to fall back.[19] One purpose of community property laws is the recognition of the considerable input of the nonemployee wife to the marriage, an input which cannot be measured by mere reference to paid work. To allow husbands to keep the bulk of their retirement benefits would invalidate the contributions of these wives, and would implicitly suggest that they are not deserving of consideration because they did not participate in the economy. It is a suggestion which cannot be supported now, if it ever could.

Congress has not definitely stated that the community interest of wives in railroad retirement benefits should be preempted by the Railroad Retirement Act or by the Social Security Act's exceptions to the anti-attachment provision. Congress has only suggested that wives should be able to garnish federal pay and retirement benefits in order that support obligations can be met. "Unless positively required by direct enactment the courts should not presume a design upon the part of Congress. . . ." *Wetmore v. Markoe,* 196 U.S. 68, 77 (1904). That direct enactment does not exist, and policy considerations favor recognition of the wife's contribution. Respondent's interest should not be preempted.

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[19]The Bureau of Research of the Railroad Retirement Board has stated that, as of 1976, only 7% of the workers in the railroad industry were female. Consequently, in the great majority of cases, it will be the wife who lacks her own work record.

CONCLUSION.

For the reasons discussed above, the decision of the California Supreme Court should be affirmed.

Respectfully submitted,

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Service of the within and receipt of a copy thereof is hereby admitted this ..... day of July, A.D. 1978.

_____

_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-533

JESS H. HISQUIERDO, *Petitioner*

v.

ANGELA HISQUIERDO, *Respondent*

On Writ Of Certiorari To The Supreme Court of California

BRIEF FOR HON. PATRICIA SCHROEDER, HON. YVONNE BRATHWAITE BURKE, HON. JOHN L. BURTON, HON. CARDISS COLLINS, HON. DANTE B. FASCELL, HON. MILLICENT FENWICK, HON. DONALD M. FRASER, HON. JIM LEACH, HON. WILLIAM LEHMAN, HON. HELEN S. MEYNER, HON. BARBARA A. MIKULSKI, HON. GEORGE MILLER, HON. GLADYS SPELLMAN

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Subject Index

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1978
NO. 77-533

JESS H. HISQUIERDO, Petitioner,

vs.

ANGELA HISQUIERDO, Respondent

On Writ of Certiorari To The Supreme Court of California

BRIEF FOR HON. PATRICIA SCHROEDER, HON. YVONNE BRATHWAITE BURKE, HON. JOHN L. BURTON, HON. CARDISS COLLINS, HON. DANTE B. FASCELL, HON. MILLICENT FENWICK, HON. DONALD M. FRASER, HON. JIM LEACH, HON. WILLIAM LEHMAN, HON. HELEN S. MEYNER, HON. BARBARA A. MIKULSKI, HON. GEORGE MILLER, HON. GLADYS SPELLMAN

MEMBERS OF CONGRESS AS AMICI CURIAE

This brief amici curiae is filed in support of the position of respondent with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

INTERESTS OF AMICI CURIAE

Amici are members of Congress who are concerned with issues affecting elderly women, many of whom live at incomes below the poverty level. As members of Congress we are also concerned about the role of Congress and the Court in maintaining the constitutional balance of federal and state power.

In particular, we have come to understand, both from letters from constitutents and in the course of studying recent proposed legislation, that two recent sociological phenomena -- the burgeoning divorce rate, 1/ and the increasing economic importance of pensions and other retirement plans 2/ -- have combined to create a substantial problem in assuring adequate support in their later years for women who have assumed the traditional primary role of mother and homemaker. Such women are increasingly faced with divorce after years of difficult but unremunerated work in the home; 3/ having been out of the job market for many years,

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1/ "[T]he recent wave of divorce reforms which made no-fault divorce the rule in all but three states [made] ... divorce readily obtainable upon unilateral demand." 124 Congressional Record No.3, H-79 (Jan. 23, 1978), remarks of Rep. Schroeder. Rep. Schroeder also stated that the national divorce rate peaked at "1 million annually in 1974." (id.)

such women are often without the skills to support themselves. Further, even if they do seek to work, these women are often discriminated against by employers on the basis of both age and sex. And, those who do manage to obtain work may have too few working years remaining to build up an adequate pension on their own behalf.

To a great extent, the federal government, rather than alleviating this situation, has aggravated it. For, many families expect to derive income during retirement from pensions and other benefits either

2/ "Over the past decades, pension benefits have become an increasingly significant part of the consideration earned by the employee for his services. As the date of vesting and retirement approaches, the value of the pension right grows until it often represents the most important asset of the marital community .... A division of property which awards one spouse the entire value of this asset, without any offsetting award to the other spouse, does not represent the equal division of community property contemplated by Civil Code section 4800." In re Marriage of Brown, 15 Cal. 3d 838 (1976).

3/ "We are a society which places value on home and family, encouraging women to stay home to take care of children. Yet one of the most severe forms of economic discrimination is that we fail to attach an economic value to this service." 124 Congressional Record No. 3, H-80 (Jan. 23, 1978), remarks of Rep. Schroeder.

based on federal employment (such as civil service employment, or military service), or provided through federal taxation (social security, and railroad retirement benefits, for example). With the exception of social security, 4/ none of these programs provide any benefits specifically earmarked for former wives.

Several bills have been introduced in recent Congresses to deal with these problems, and many days of hearings have been held. (See, e.g., Pension Problems of Older Women, Hearings before the Subcommittee on Retirement Income and Employment of the Select Committee on Aging, House of Representatives, 94th Congress, 1st Sess. (1975); Annuity Provisions for Former Spouses, Hearings before the Subcommittee on Compensation and Employee Benefits of the Committee on Post Office and Civil Service, on H.R. 3951, House of Representatives, 95th Congress, 1st Sess. (1977).) Among the proposals introduced in the present session of Congress have been federal legislation mandating pro-rata division of civil service retirement benefits upon divorce after

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4/ The OASDI program has provided some benefits for certain divorced wives and widows for some years; the former 20-year marriage requirement for such benefits was lowered as of 1979 to a 10-year requirement. See 42 U.S.C. §§ 402 (b), (e), and (g), 416 (d), (e); Pub. L. 95-216, Title III, § 317 (a), (c), 91 Stat. 1548 (Dec. 20, 1977).

twenty years of marriage (introduced by Rep. Schroeder) (H.R. 3951); similar legislation providing for pro-rata division of military retired pay and death benefits (H.R. 11354, also introduced by Rep. Schroeder); and a bill which would divide civil service pensions upon divorce after five years of marriage, but only if the state divorce courts failed to consider such pensions as marital property (H.R. 9412, introduced by Rep. Leach).

Strong objections, however, were raised to this type of approach. Principally, these objections, voiced particularly by the U.S. Civil Service Commission, were based on the fact that "[S]tate laws and state courts have always controlled in matters of domestic and property rights." (Letter of Alan K. Campbell, Chairman, U.S. Civil Service Commission, printed in H.R. Rep. No. 95-713, 95th Cong., 1st Sess [1977], at 7). While the Commission realized that some federal rules in this area may be appropriate, it believed that extensive consideration was necessary before such federal intrusion into traditional state areas could be undertaken (id.).

Upon investigation of these objections, the Committee on Post Office and Civil Service of the House of Representatives determined that many states, including both community property states and common law states which recognize equitable division of marital property, 5/ recognize the rights in retirement benefits earned during marriage as divisible upon divorce. Yet, the federal government's involvement in

retirement benefits was proving an impediment even to these state law developments, for federal administrative agencies did not recognize state divorce decrees splitting retirement benefits when those decrees required federal cooperation.

Consequently, this Congress was unwilling to embark without further study upon the momumental task of fashioning a law of property division upon divorce pertaining to federally-derived retirement benefits. Rather, the Committee on Post Office and Civil Service recommended that the federal government should cooperate with the efforts of states, operating within their traditional sphere, to accomodate the realities of present family property accumulations by viewing annuities, including those derived from federal sources, as property divisible upon divorce. H.R. 8771, recommended by the Committee and passed by the House of Representatives by a vote of 369 to 7 6/ addresses this problem as to civil service retirement benefits, by providing that the Civil Service Commission shall pay benefits

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5/ Prof. Harry Foster presented the following list of "states holding that pension or retirement benefits are community or marital property": Community property states- California, Idaho, Louisiana, New Mexico, Texas, Washington; Equitable distribution states- Missouri, New Jersey, Wisconsin. Hearings, Annuity for Former Spouses, supra, at 49.

to a former spouse if a court order or property settlement upon divorce, annulment, or legal separation so provides. 7/ This bill, unlike the earlier proposal to mandate pro-rata division, was supported by the Civil Service Commission as consistent with the traditional state and federal roles in this area. (H.R. Rep. No. 95-713, supra, at 9; see also id., at 10-11). 8/

In this case petitioner argues in effect that the traditional state responsibility to divide property upon divorce

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6/ A similar bill has been approved by the Senate Subcommittee on Civil Service and General Services, of the Committee on Governmental Affairs, and is awaiting referral to the full Committee and to the whole Senate.

7/ At page 23 of their brief the United States misquotes Rep. Schroeder's statement concerning the effects of H.R. 8771. They state that Rep. Schroeder stated the bill would "change the fact that 'under the supremacy clause (Article VI, cl. 2) of the Constitution, valid congressional enactments preempt conflicting State community property provisions.'" (Emphasis added).

Rep. Schroeder was merely stating the well established principle that the supremacy clause serves to preempt State community property provisions that conflict with federal law. H.R. 8771 would not change this established legal principle. It does serve

should be considered superceded whenever the federal government provides for retirement income based on employment without

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7/ continued

to provide a mechanism for enforcement of state court judgments and operates to supercede any federal laws that might indicate a preemption problem existed in this respect.

8/ The bill is also supported by the ABA Family Law Section; "The Family Law Section recommends the adoption of [H.R. 8771] because a civil service annuity may be the most substantial asset produced by the parties during their marriage and, if it is not considered in the distribution of marital property, economic hardship will be visited upon many middle aged and elderly spouses whose marriage is dissolved. It should not be insulated from distributable marital property. It is no answer to assert that an annuity may be considered in setting alimony because of the inherent difficulties in the enforcement and collection of alimony.

Legislation such as H.R. 8771 is urgently needed and if enacted would permit federal cooperation with state law and court orders in this significant area of divorce which affects the lives and economic future of millions of our citizens whose most frequent contact with the administration of justice may be made in such cases." (ABA Section of Family Law, Report to the House of Delegates, to be presented in August, 1978).

creating a special benefit for divorced spouses. The United States by now arguing in support of petitioner apparently has reversed its former position -- that state laws and state courts have been and should remain presumptively controlling in matters of domestic property rights. The United States, instead, now supports the creation of a federal common law of property division upon divorce. Petitioner's theory, if accepted by this court, would create as federal law a rule detrimental to the displaced homemakers described above. Further, were the theory propounded by petitioner adopted, the implications for federal legislators would be enormous: as to every piece of legislation which could affect family property matters, Congress would be compelled to consider whether the legislation ought to displace state law, and if not, to so provide explicitly, rather than, as in the past, assuming the application of state law and creating uniform, explicit federal rules only where necessary to the federal scheme.

Thus, our concern in filing this brief is both with the particular problems of elderly divorced women and with the proper federal and state role in matters pertaining to family property. While it may well be that the situation is one which calls for a federal legislative solution, at least as to federally-derived benefits, we do not believe that the state rules should be displaced unless and until careful and comprehensive consideration is given to the effects of such displacement, and to the appropriate uniform rules to be enacted.

Since there is no evidence that former Congresses ever considered these matters in enacting the statutes creating the various kinds of federal retirement benefits, preemption by way of imputed intent would be entirely inconsistent with the basic division of responsibilities between the state and federal governments. It is to elaborate upon this view that we file this brief.

SUMMARY OF ARGUMENT

I. There are two tests by which to evaluate whether a federal statute preempts a state law: (1) In the instance of an "actual conflict" between the two legislative schemes or (2) In the instance of an "unambiguous Congressional mandate" to preempt. Absent either of these circumstances a weighty presumption favors the validity of the state law, particularly in an area such as domestic relations, which has historically remained in the domain of the States.

II. The Railroad Retirement Act does not preempt California community property law regulating the division of community benefits upon dissolution of marriage. There is no indication of a "Congressional mandate" to preempt California law evidenced in the character of the Railroad Retirement Act, the designation of the employee as "beneficiary" of the plan, the provisions of the plan regarding spouses, nor the anti-assignment provision of the Act. There is no "actual conflict" between the two legislative schemes manifested by any of these factors either.

A. The character of the Railroad Retirement Act suggests that the Act most resembles a private pension plan. The Act's content resulted from railroad industry bargaining negotiations between management and labor. There is no indication that Congress intended the Act to be treated differently than private pension plans in terms of local property laws.

B. The designation of an employee as beneficiary under the Railroad Retirement Act illustrates no intent to preempt state law nor any federal-state conflict. State community property laws operate in many ways, including instances of death or on-going marriage, upon federally-derived benefits. The mere creation of a federal property right does not warrant the creation of a federal law for division of property: federal salaries are not exempt from state property laws merely because they are federal in origin.

Furthermore, all financial obligations of a beneficiary are not terminated merely because he received federally-derived benefits, so receipt of the annuity amount in full is not assured. Pension benefits could be divided upon divorce without decreasing benefits received by the employee-spouse; and on the other hand, other obligations of the employee-recipient may affect the annuity amount available to him on a monthly basis.

C. The provisions regarding spouses provide no illumination of Congressional intent nor do they reveal any 'actual conflict' with state law. The legislative history

shows that benefits for divorced wives were omitted in order to minimize costs for the Retirement system, not to ensure that divorced wives be cut-off from benefits.

D. The anti-assignment provision of the Railroad Retirement Act cannot be read as preempting California law by Congressional mandate or by implication. Community property division of benefits is neither an "assignment" nor an "anticipation" of benefits, as prohibited by the act.

III. Past authority of this Court, in which federal laws were found to preempt state community property laws, are distinguishable from the present case. Past cases involved state rules for disposition of community property upon the death of one spouse which conflicted with specific federal statutes regulating the disposition upon death of that specific property. No specific federal law, as part of the Railroad Retirement Act or otherwise, specifies a method for distribution of community property upon divorce.

Since neither test for federal preemption of state law is met by the facts of this case, the judgment below should be affirmed.

ARGUMENT

I

A FEDERAL STATUTE PREEMPTS STATE LAW ONLY IN THE INSTANCE OF "ACTUAL CONFLICT" BETWEEN THE TWO LEGISLATIVE SCHEMES OR AN "UNAMBIGUOUS CONGRESSIONAL MANDATE" TO PREEMPT

The principle which governs evaluation of whether state law is preempted by federal statute has recently been restated by this Court.

> Where ... the field which Congress is said to have preempted has been traditionally occupied by the States . . . 'we start with the assumption that the historic ... powers of the states were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress.' Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, (1947). This assumption provides assurance that 'the federal-state balance' United States v. Bass, 404 U.S. 336, 349 (1971), will not be disturbed unintentionally by Congress or unnecessarily by the courts.
> Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

Thus, state legislation as to certain matters is to be presumed valid in the absence of either "such actual conflict between the two schemes of regulation that both cannot stand in the area" or "an unambiguous congressional mandate" to preempt state law. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141, 146 (1963).

Primary among those areas as to which this weighty presumption against federal preemption applies are laws dealing with domestic relations generally, and family property matters particularly. For, from the formation of the nation, "[t]he whole subject of domestic relations, of husband and wife, parent and child [has] belonged to the laws of the States and not to the laws of the United States." (In re Burrus, 136 U.S. 586, 593 (1890)). As a consequence, "there is no federal law of domestic relations, which is primarily a matter of state concern." (De Sylva v. Ballentine, 351 U.S. 570, 580 (1956)). And, since state laws in this area typically involve "an ingenious, complex, and highly purposeful distribution of ... rights between husband and wife" (United States v. Yazell, 382 U.S. 341, 351 (1966)), application of federal law, as to a particular matter, even for the protection of federal interests, is likely to cause consequences to the parties through the interaction with complicated state rules which federal courts are unlikely to foresee. Consequently,

> "[b]oth theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements [which] should be overriden only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." (Yazell, supra, 382 U.S., at 352 (emphasis added)).

Thus, from these cases two possible tests emerge to measure whether the Railroad Retirement Act of 1974, 88 Stat. 1305, 45 U.S.C. §231 ff. mandates the preemption of California community property laws as applied by the California Supreme Court:

(1) Is there an "unambiguous congressional mandate" that directs that the Railroad Retirement Act preempt California community property law? or

(2) Is there an "actual conflict" between the California community property scheme and the Federal Railroad Retirement Act so that both cannot stand in the area of division of benefits upon dissolution of marriage?

The answer to both these questions is no.

II

THE RAILROAD RETIREMENT ACT DOES NOT PREEMPT CALIFORNIA COMMUNITY PROPERTY LAW REGULATING THE DIVISION OF COMMUNITY BENEFITS UPON DISSOLUTION OF MARRIAGE.

The Railroad Retirement Act, unlike other federal statutes 9/ is entirely lacking in the necessary clear and explicit indication of intent to create a federal rule governing family property rights. The various indices of intent relied upon by petitioner, and by the United States, indeed, suggest only that Congress never expressly considered whether, and to what degree, state family property laws should apply with respect to Railroad Retirement benefits. Nor would application of state laws dividing the right to pension benefits upon divorce fundamentally undermine the Congressional scheme. No conflict exists between the Railroad Retirement Act and California community property law.

A

The character of the Railroad Retirement Act suggests that it most resembles a private pension plan and that Congress did not intend the Act to be treated any differently than a private plan in terms of local property laws.

9/ See part III, at page 45.

We agree with the United States that petitioner's argument concerning whether or not benefits under the federal railroad retirement system are property at all is not pertinent. 10/ California has determined that the Railroad Retirement benefits are to be treated as community property upon divorce, and the question of what kinds of contingent rights may be so treated is a state, not a federal, question.

It does seem significant to evaluation of the preemption argument, however, that the presentation of the history and character of the Railroad Retirement System by the United States is somewhat skewed. For, that system, "the only federally administered pension plan for workers of a single private industry" (Report of the Commission on Railroad Retirement, The Railroad Retirement System: Its Coming Crisis (hereinafter "Commission Report") (1972), at 56), "is today, in essence, a company pension program administered, for historical reasons, by the federal government." (S. Rep. No. 93-1163, 93rd Cong., 2d Sess., reprinted in U.S. Code Congressional and

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10/ We do note, however, that whether or not benefits payable under the Act are contractual, or are vested, is not the relevant question. A legitimate expectancy may be a property right although neither contractual nor vested. See, e.g., Board of Regents v. Roth, 408 U.S. 564 (1972); Mathews v. Eldridge, 424 U.S. 319 (1976).

Administrative News p. 5702 (1974), at 5714). 11/

11/ The "historical reasons" were explained in the Commission Report as follows:

> Since the 1850's Congress, with land grants and Federal charters, had treated the railroads much as a single transportation system and railway employees as quasi-public servants - two assumptions underlying the single-industry approach to the railroad retirement plan and the willingness to take Federal action. Railroad labor had generally enjoyed a friendly relationship with Congress. Relations were especially warm after the passage of the Interstate Commerce Act of 1887 and the Railway Labor Act in 1888. Much railway labor legislation - for example, the establishment of a standard, eight--hour work day in 1916 for the operating group employees-- was justified through the interstate commerce clause of the Constitution. Advocates of a Federally-regulated railroad pension system therefore reasoned that Congress would be sympathetic if shown that the retirement of older workers would result in increased safety and efficiency in interstate commerce.

(Commission Report at 55).

The new 1974 Act, as well as the 1937 amendments which ended the constitutional litigation concerning the program, 12/ and many of the subsequent amendments, were first negotiated between labor and management, and then enacted into law substantially as negotiated. 13/ Contributions into the

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12/ The first Railroad Retirement Act, passed in 1934, before the Social Security Act, was declared unconstitutional in Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330 (1935). The 1935 Act was also enjoined as unconstitutional by a district court (Alton Railroad Co. v. Railroad Retirement Board, 16 F. Supp. 955 (1936)), but that litigation was dropped after labor-management negotiations resulted in a memorandum of agreement, the principles of which became the Railroad Retirement Act of 1937. See Commission Report, at 57-58. See also, as to other amendments negotiated by labor and management, id., at 68.

13/ After the Commission on Railroad Retirement, established by Congress in 1970 to study the actuarial soundness of the system and make recommendations for its long term development (Pub.L. 91-377, 84 Stat. 791), made its report, Congress, in Pub. L. 92-460, 86 Stat. 765 (1972), instructed railroad labor and management to enter into negotiations and to submit a report containing their mutual recommendations upon restructuring the retirement system. Those recommendations were the basis for

Railroad Retirement Fund are made through taxes on both the employer and the employee, but the employee pays only the same tax rate as is paid by employees covered by social security, while employers are taxed not at the same rate as in social security but at a much higher rate. S. Rep. No. 93-1163, supra, U.S. Code (1974), at 5716-17. And, the Railroad Retirement Account, unlike other trust funds administered by the federal government, is

> treated similarly to trust funds established for the payment of other private pension plans, with investments being made solely on the basis of the best return on investments, and other considerations such as the efficient management of the public debt not being taken into account ..."
> S. Rep. No. 93-1163, supra, U.S. Code (1974), at 5714.

Moreover, benefits in the 1935 Act were, like private pension benefits, based solely upon salary and length of service. (Commission Report, at 58).

13/ continued

the 1974 Act. See Women and Railroad Retirement, Hearings Before the House Subcommittee on Retirement Income and Employment, Select Committee on Aging (94 Cong., 1st sess.) (1975), at 20.

While, in the years between 1935 and 1974, the plan began "to embrace provisions of the social security system (basically social insurance) [although it was] essentially an employee retirement plan" (id., at 73), the 1974 revisions were designed to separate the social insurance aspects from the employee retirement plan aspects, and to return to the original concept of a pension plan. (S. Rep., supra, U.S. Code (1974) at 5714.

Finally, despite the contention of petitioner, and of the United States, that there is no "vesting" notion in the plan, the 1974 revisions contain extensive transition provisions designed to assure that no employee loses rights which have already matured; it is plain from the language of the committee reports that Congress believed that it would be inconsistent with the premises of the system retroactively to revise benefits downward. S. Rep., supra, U.S. Code (1974), at 5716.

Thus, the railroad retirement system, at this point, is best viewed as analogous to private pension plans, rather than as a specialized social security system. 14/ Under California law, and the law of many other states, had Ms. Hisquierdo's husband worked for any private company rather than a railroad, any pension benefits earned would have been divisible upon divorce. And, while there have been recent refinements in this rule, the basic concept that pension benefits are divisible upon divorce long antedates the 1974 completely revised

Railroad Retirement Act. (See, e.g., Crossan v. Crossan, 35 Cal.App. 2d 39 (1939) Estate of Perryman, 133 Cal. App. 2d 1 (1955)). The proper approach to the pre-emption question, therefore, ought to be whether there is any indication that Congress intended to displace state laws applicable to division of rights in private pension plans upon divorce, with the result that

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14/ The United States makes much in its brief (at 2-5) of similarities between the Social Security system and the Railroad Retirement Act. These analogs are overshadowed by the legislative history which demonstrates the Railroad Retirement Act is more analogous to a private pension plan. However, it is interesting to note that even the Social Security Act relies on state law authority in the area of family law.

For determining definitions of family law terms such as widow, widower, child and parent, the Railroad Retirement Act does cite to 42 U.S.C.§416(h) of the Social Security Act. However, the relevant social security act section refers to state law for a determination of marital status and other family law related definitions. Thus, even the social security act, like private pension systems, relies on state law authority in the area of family law.

railroad retirement benefits, otherwise analogous to private pension plans, be treated differently than private pensions. The provisions of the Act reveal no such intent.

B.

The designation of an employee as beneficiary under the Railroad Retirement Act illustrates no intent to preempt state law nor any federal-state conflict.

The United States relies upon the fact that Congress designated the employee as the recipient of the annuity and set benefit levels designed to assure security to that employee as evidencing intent to preempt state law. If that benefit level were reduced through a community property settlement, it is suggested, the intention to provide the employee himself with adequate support would be thwarted. (United States Br., at 13-14).

First, the notion that "[w]hen federal law designates a single beneficial owner. . state law cannot say that there were "really" two beneficial owners all along" (id., at 21) proves entirely too much. For, despite this broad, general statement no contention is made, we take it, that California community property law may not operate in any manner whatsoever upon railroad retirement benefits. For example, if the railroad employee remained married to his or her spouse after retirement, until the death of one or the other spouse,

all benefits received pursuant to the federal scheme by the employee and by the spouse would be, under California law, community property to the extent derived from labor during the marriage. (See Witkin, Summary of California Law, 8th Ed. Vol. 7 at 5113 and cases cited therein.) As a result, one-half of any traceable assets[15] derived from such benefits would be automatically the property at death of the surviving spouse, regardless of any purported testamentary disposition to the contrary.[16] We do not

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15/ California presumes all assets acquired during marriage to be traceable to community property, so that clear proof of a source in separate property is necessary to avoid inclusion in the community estate. (See Witkin, supra, at 5096 and California Civil Code sections cited therein.)

16/ Under California law, however, any future annuity payments, after the death of the employee or the spouse, would not be community property, and therefore no portion of such payment could be disposed of in the estate of the predeceasing spouse. Waite v. Waite, 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972).

understand petitioner, or the United States, to be suggesting that federal law forbids this result, and requires instead that the benefits paid remain for all purposes the separate property of the employee or the spouse to whom the benefits are addressed originally.17/

17/ The Railroad Retirement Act does provide for certain lump sum payments to designated relatives of the covered employee upon that employee's death. See § 6 of the Railroad Retirement Act of 1974, 42 U.S.C. §231 e. Under California law, however, such lump sum payments would not be community property since the community property of a spouse in employment-related benefits terminates with the death of either spouse. See, e.g., In re Marriage of Peterson, 41 Cal. App. 3d 642 115 Cal. Rptr. 184 (1974); In re Marriage of Bruegl, 47 Cal. App. 3d 201, 120 Cal. Rptr. 597 (Cal. Ct. of App. 1975); In re Marriage of Fithian, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369, cert. denied 419 U.S. 825 (1974). Thus, there is no possible preemption problem with respect to the devolution of such lump sum payments. See Fithian, supra, 10 Cal. 3d at 600, 517 P.2d at 453-454, 111 Cal. Rptr. at 373-374.

Indeed, any such suggestion, if made, would be quite extraordinary. Whatever else the federal statute may do, it does not purport explicitly to erect a federal rule concerning devolution of the benefits once paid to the appropriate designated recipient. And, given the extreme complexity of the estate laws of the various states, and the great differences among them, creating federal common law rules regarding disposition upon death of federal source property, and superimposing such rules upon the various state laws, would be an impossible task which Congress could not possibly have intended.

Moreover, the granting of property to an individual by the federal government does not in itself create a federal law of property to govern the incidents of ownership or the devolution of the property once received. For example, when the United States grants real property:

> Once patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts. (Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 676 (1974).)

Thus,

> The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the state in their grants; but whatever incidents or rights attach to the

> ownership or property. . . will be determined by the states. . . (Packer v. Bird, 137 U.S. 661, 669 (1891).)

Similarly, railroad retirement benefits once received are currently treated in California as community property for certain federal income taxation purposes.18/ (See Internal Revenue Service, Pub. 555, Community Property and the Federal Income Tax (1978), at 3.) This treatment is premised upon the general rule that conclusive state rules of property division generally, and of community property particularly,

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18/ Railroad retirement annuities, like Social Security benefits, are generally not themselves taxable. 45 U.S.C. § 231m. Certain other retirement annuities to federal employees, such as civil service retirement benefits and military retired pay, are fully taxable as income by the federal government. For federal taxation purposes that proportion of such benefits traceable to earnings while domiciled in a community property state are divisible as community income for tax reporting purposes. (IRS, Pub. 555, supra, at 2-3.)

govern attribution of income under federal tax laws except as specifically otherwise provided. (Poe v. Seaborn, 282 U.S. 101 (1930); see Fernandez v. Wiener, 326 U.S. 340 (1945).) We do not understand petitioner, or the United States, to be suggesting that railroad retirement benefits remain, by virtue of their source, the separate property once received of the person designated to receive them; any such contention would be inconsistent with the tax treatment of the benefits.

Second, the argument would lead to the conclusion that salaries paid by the United States to its employees are similarly exempt from state laws concerning division of property upon divorce. For, those salaries are also by statute payable to the employee. See, for example, 28 U.S.C. § 5 setting the salary of Justices of the Supreme Court of the United States:

> The Chief Justice and each associate justice shall each receive a salary at annual rates determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title.

Federal salary levels are set without taking into account any community property consequences. Yet, while future salaries are not, of course, divisible upon divorce, savings from past salaries, and assets purchased with such salaries, are of course subject to state community property law regardless of their federal source, and are

treated in this way for federal income tax purposes when separate returns are filed. (IRS Pub. 555, supra.)19/

Third, in designating the annuity for the employee and setting the benefit schedule, Congress did not purport to eradicate all obligations which the covered employee might incur, whether before or after receiving the benefits, which could diminish the amount actually available for living expenses for himself. Nor were state laws which could affect the nature of such obligations displaced, so that the amount of money available for living expenses may well vary according to state law. For example, if a covered employee who entered into an unsecured loan before receipt of benefits began to meet pre-retirement expenses, with payments to continue into the retirement period, he might be constrained to repay that loan in part out of his annuity once received, and state law could affect that obligation -- through usury provisions,

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19/ In a footnote, the court in Wissner, infra, said that it was not deciding "whether California is entitled to call army pay community property." (338 U.S., at 657 n.2). The proposition, however, has not to our knowledge since been questioned, and the alternative -- a federal rule for property division upon divorce or death for all federally-derived property -- seems out of the question.

for instance, or simply through rules governing contractual interpretation. 20/

Indeed, it is conceded that benefits may be reduced directly due to state law concerning family obligations upon divorce. (United States, Br. at 16,22.) And, state laws vary greatly as to the principles governing the award of child support and alimony; several states, for example, do not award alimony at all under any circumstances, relying instead upon property divisions to accord economic equity between the former spouses. (See for example the Texas case cited in the Appendix to the Brief of United States as Amicus Curiae.)

Moreover, the United States also regonizes that

> [i]n setting the level of alimony payments, state courts may consider the amount of railroad benefits to be received [and] may also encourage the parties voluntarily to take such payments into account in reaching reasonable property settlements.
> (United States Br., at 22.)

As the United States notes, such awards or settlements could have the same effect as community property divisions -- that is, the economic security of the employee "would be severely threatened."
(United States Br., at 14-15).

20/ See pgs. 36-45, infra. for a discussion of the pertinence of the anti-assignment section to this hypothetical.

The United States attempts to reconcile its recognition that Congress did not intend to insulate railroad retirement benefits from all legal obligations generally, and from monetary obligations incurred on account of a former marriage in particular, with its position in this case by supposing that Congress was willing to sanction a diminution of benefits due to the needs of dependents, but not the dividing of retirement payments "without regard to the needs of the divorced spouse or the effect on the retired worker." (United States Br., at 22).21/ Aside from the argument based upon §§ 459 (42 U.S.C.§659) and 622 (42 U.S.C.§401 ff.) of the Socal Security Act, which are discussed below, however, the United States is unable to explain how it is able to derive this intent from a statute which says nothing whatever about the treatment of employees' railroad annuities upon divorce. To import that "need" rationale is indeed to create, without legislative sanction, a federal rule of family law.

21/ It is not clear whether the position of the United States would foreclose those non-community property states which practice "equitable division" with respect to pension rights from continuing to do so with regard to railroad retirement benefits. These states do not "divide the retirement payments in half as a matter of course" (United States Br., at 22), but they view the division as a matter of marital property law, and may therefore not take into account need. It would appear that the United States must

Fourth, the United States fails to note that California courts have created ways of taking pensions into account in divorce property settlements which would not involve diminution of the payments when due, either directly or by way of an order to pay over a portion of the benefits to the former spouse if and when received. One discretionary remedy available to California courts is the valuation of the pension right at the time of the divorce, using actuarial principles, and an adjustment of the division of other property to account for this value. (See In re Marriage of Brown, 15 Cal. 3d 838 (1976) and cases discussed therein.) Such an approach would not, as would alimony and child support awards, result in the beneficiary having less money available for daily sustenence once retired than Congress intended.

Finally, the amount available to the employee himself for his living expenses after retirement may be affected by many other state laws concerning family obligations which Congress could not possibly have intended to displace. For example, the railroad retirement system does not provide benefits based on the number of minor children whom the employee has an obligation to support under state laws; and, state laws vary as to the age at

21/continued:
intend to encompass such divisions as well in its argument; otherwise, its argument would amount to nothing more than the contention that Congress intended to ensconce common law, rather than community property, principles of marital property into federal law.

which this support obligation is extinguished. Similarly, state laws vary as to the obligation to support aged parents.

Thus, the fact that Congress designated the annuity as payable to the employee and hoped in setting benefit levels, to provide adequate support for the individual cannot in itself be said to displace all state laws which might have the effect of making another person entitled to a portion of the benefits once paid, or which permit the prospect of the benefits to be taken into account in establishing obligations.

C

The privisions regarding spouses provide no illumination of Congressional intent nor do they reveal any "actual conflict" with state law.

The fact that Congress provided that spousal benefits are to terminate upon divorce cannot supply the requisite intent to preempt state law either. The spousal benefit is an additional amount, over and above the amount due to the employee. As such, it constitutes an additional burden upon the system as a whole, necessitating either lower overall benefits or higher tax rates to finance than would be the case if no such benefit were available. The decision to terminate this benefit upon divorce can thus be viewed as a decision that, given the wide variation in state laws as to support obligations and property settlements upon divorce, it would be unwise to in effect create a federal obligation of

support, in a set amount, by burdening the entire system with an additional benefit for divorced spouses. That is, were such an annuity available on top of the regular employee's annuity, all employees under the system would be financing a family property right after divorce which might be inconsistent with the rule applicable to private pension plans in their state.

The legislative history of the 1974 Act supports this contention by showing that the reason for rejecting suggested benefits for divorced wives was not the belief that such wives ought not to receive any portion of the employee's annuity, but rather an unwillingness to create an additional benefit, with the attendant financial consequences for the plan as a whole:

> This matter [of a benefit for divorced wives similar to that provided under the Social Security Act] was gone over very thoroughly by the Joint Negotiating Committee22/ . . . [T]he conclusion that the Joint Negotiators reached was that at the present time, given the financial situation of the fund, the benefit liberalization provided in this bill was the full extent to which Congress ought to go. . . A line has to be drawn

22/ As explained supra, at page 19, the bill which became the 1974 Act resulted from agreements reached by a negotiating committee composed of labor and management.

> someplace, and the bill indicates the lines that the Joint Negotiators thought ought to be drawn at this time. (Statement of Mr. William Dempsey, member of the Joint Negotiating Committee, at the hearings on the bill, in response to an inquiry by Chairman Staggers of the House Interstate and Foreign Commerce Committee, reproduced in Women and Railroad Retirement, supra, at 5.23/

Thus, the determination to terminate spousal benefits upon support does not, as is argued, constitute an unequivocal intention to displace state laws concerning the rights of divorced spouses; it simply reflects an intention not to create a federal right because of the financial consequences of doing so, rather than because of an intent to cut-off divorced spouses.

23/ Because the bill was formulated, pursuant to Congressional direction, by the Joint Negotiating Committee, this intent of private individuals is entitled to more than its usual weight, and it must be assumed that Congress adopted as its own the intent stated. The legislative history relied on by the United States (Br. 16-17) is not to the contrary. First, it involves residual death benefits, not periodic support payments, or payments pursuant to divorce. Under California law, death benefits would not be part of the community estate upon divorce. See n. 17, supra. Second, it pertains to the prior Act, not to the entirely revised 1974 Act. Third, it involves a choice between various potential beneficiaries; here, the present spouse, if there were one, would remain entitled to the spousal annuity, so that no choice among beneficiaries need be made.

D

The anti-assignment provision of the Railroad Retirement Act cannot be read as pre-empting California law by Congressional mandate or by implication.

The United States finally relies for the requisite intent to preempt state law upon the fact that the annuity is not "assignable or ... subject to garnishment, attachment, or other legal process ... nor shall the payment thereof be anticipated." (45 U.S.C. § 231 m). Reliance is also placed upon the fact that an exception to this provision for child support and alimony has recently been amended to make clear that the exception does not pertain to community property divisions. 42 U.S.C. § 659.

The relevance of the exception created by 42 U.S.C. § 659 can be dealt with very briefly. For, the 1977 amendment making clear that property settlement orders are not within the garnishment provision, merely puts matters with respect to such settlement orders back to where they were before Congress created the alimony and child support exceptions to the garnishment rule to begin with, in 1974. 24/ That is, the 1977 amendment subjects property division orders to the same rules which were

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24/ The language of § 231 m is precisely the same as that contained in the prior Act. (See legislative history following 45 U.S.C.A. § 231 m)

applicable before 1974 to all other obligations of the retiree or potential retiree, including obligations to pay alimony and child support. 25/

25/ Thus, the 1974 exception, and the 1977 clarifying amendment thereto, cannot supply the "need" rationale propounded by the United States (see pgs. 31 - 33, supra). For, those provisions, particularly given their origin in concern for keeping dependents off the welfare rolls (see United States Br., at 18-19), may well evidence an intent that federal benefits and salaries may be garnished -- that is, diverted from the designated recipient to dependents without ever being paid to that recipient by the United States -- only where there is a strong federal interest -- limiting the number of dependents forced to seek welfare -- and not otherwise. The fact that the exception is not limited to those on the welfare rolls is, of course, not inconsistent with this motive. Spouses and children not presently on the welfare rolls could easily be forced on to those rolls in the future if their support payments proved uncollectable. But the need distinction cannot be carried over to the substantive question of whether community property rights, although not collectable by garnishment on the federal government, nonetheless remain obligations enforceable by other means.

The case reproduced as an Appendix to the United States brief is therefore also entirely beside the point, since it

The only question, then, is whether community property division of federally administered retirement benefits upon divorce constitutes an impermissible "assignment" or "anticipation" of such benefits under § 231 m. 26/

First, neither of the terms suggested by the United States as here applicable have, in ordinary legal parlance, the meaning attributed to them. Plainly, the California law can operate without "assigning" any interest to the divorced spouse. An "assignment" of a right ordinarily connotes the complete substitution of a third party for the individual to whom the right was originally due. (See e.g., E. Griswold, Spendthrift Trusts, at 455-456.) In this context, therefore, the prohibition against assignment means simply that the recipient or potential recipient of an annuity may not, for consideration or otherwise, convey to another the right to receive from the government the periodic benefits or any portion thereof. As such, the "assignment" interdiction is merely the counterpart of the garnishment and attachment provisions,

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25/ continued

determined only that a Texas order for division of community property may not be enforced by means of garnishment on the United States.

except that it prevents the conveyance of the right to receive benefits directly from the fund as well as any transfer by operation of law.

For example, California law permits a court to order a parent

> to assign to the county clerk, ... or other officer of the court ... that portion of salary or wages ... as will be sufficient to pay the amount ordered for the support ... of the minor child. Such order shall operate as an assignment and shall be binding upon any existing or future employer of the defaulting parent upon whom a copy of such order is served ...."
> Cal. Civ. Code § 4701.

The provision is applicable to pension funds and retirement benefits. A state law which purported similarly to provide with respect to community property divisions 27/ would, obviously, be preempted by § 231 m; no such assignment could be ordered (or made voluntarily), and the Railroad Retirement Board could refuse to honor any purported assignment and continue to pay the benefits directly to the employee-beneficiary such as Mr. Hisquierdo. 28/

26/ The United States apparently concedes that only those two terms are arguably relevant. (United States Br., at 18-19).

But, Ms. Hisquierdo is not here claiming any right to be paid a portion of Mr. Hisquierdo's benefits when due by the Railroad Retirement Board; she apparently concedes the impermissibility of such a remedy. Thus, the prohibition upon "assignment" has no applicability here.

The same may be said of the "anticipation" clause. While we have found no direct explanation of the "anticipation" language in the legislative history, it is

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27/ Cal. Civ. Code §§ 4351, 4363, 4363.1, 4363.2, and 4363.3, Cal. Stats. 1977, ch. 860 § 4, do permit joinder of employee pension benefit plans in divorce proceedings, and allow orders directing payment of a portion of benefits when due by the plan to the former spouse. However, a pension plan may decline to be joined once served (§ 4363.1 (b)), and, if it does so, no enforceable order may be entered requiring it to divide the pension (§ 4351).

Thus, Ms. Hisquierdo would have no right under California law to direct payment by the Railroad Retirement Board were this a completely private pension, and there is therefore no preemption problem in this respect.

28/ H.R. 8771, supra, if it becomes law, would permit similar treatment of civil service retirement benefits, for property orders upon divorce and to that degree would overrule the anti-assignment provisions of the civil service retirement statute.

almost certainly a term of art derived from language used in spendthrift trusts, and in state statutes concerning the alienability of retirement and disability benefits. (See E. Griswold, Spendthrift Trusts (1947), at 119, 542.) In this context, a restraint upon "anticipation" is "a direction that the interest of a sole beneficiary shall not be paid to him before a certain date." (Id., at 583). Read in this light, the "anticipation" provision of § 231 m is simply a prohibition upon attempts by the retiree or potential retiree to require payment of periodic benefits not yet due, or to compel a lump sum payment inconsistent with those provided by statute. As such, the provision has nothing to do with this case.

Not only is there no support in the language of § 231 m for the preemptive intent claimed, but any reading of the language such as that suggested by the United States would be truly extraordinary. Such a reading, for example, would suggest that a contract entered into before retirement by a railroad retiree could not be enforced by an order to pay, if any part of the funds available for payment might be derived from retirement benefits. It would also suggest that, in determining the capacity of a potential railroad retiree to repay a loan, the loaner could not take into account the prospect of retirement benefits. Plainly, Congress did not intend to absolve railroad retirees of all legal obligations once retired, or to preclude them from "anticipating" the benefits in the sense of expecting to receive them. Section 231 m refers only to the means of enforcing obligations, not to their existence.

Similarly in the case before the court Mr. Hisquierdo is entitled to sue Ms. Hisquierdo for dissolution of marriage. Under state law, the community property must be divided equitably. Under state law the railroad retirement benefits are community property and must be considered in valuing the community's worth. Once the division is made, if Mr. Hisquierdo owes Ms. Hisquierdo money she can enforce her judgment against him by any means except attachment or assignment of his railroad pension benefits according to § 231 m. If he has no other assets she may have a right without a remedy. But § 231 m does not eradicate her right, i.e., her community property interest under state law in the pension -- it only affects her ability to enforce her right.29/

29/ The United States implicitly recognizes this construction as valid. For example, they acknowledge that state courts may take prospective railroad retirement annuities into account in setting alimony and child support (Brief at 22) and the U.S. does not suppose that, before the 1974 garnishment exception, alimony and child support orders to be paid from retirement benefits were simply void (Brief at 22). And, the U.S. recognizes that "the parties voluntarily [may] take such payments into consideration in reaching reasonable property settlements" even though no garnishment would be available, because of §231m (Brief at 22). But these concessions demonstrate the internal inconsistency in the United States' argument for, if a court order that Mr. Hisquierdo immediately pay Ms. Hisquierdo the actuarial equivalent of her share of the benefits is (continued on next page)

The United States suggests that this Court in Wissner v. Wissner, 338 U.S. 655 (1950) has foreclosed any direct confrontation with the language of § 231 m, by construing "a federal statute almost identical to section 231 m" as in flat conflict "with a state judgment declaring insurance proceeds to be the community property of the decedent and his widow." (United States Br., at 21). But both halves of this contention are incorrect. The Wissner statute was not "almost identical"; it differed substantially and materially. And, in any event, the court reached the conclusion that the property division was preempted independently of the anti-attachment provision.

The anti-attachment statute in Wissner provided that

> Payments to the named beneficiary shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal

29/ continued

"anticipation" as the United States asserts, so is taking pension benefits into account in a voluntary settlement, which they acknowledge is acceptable. And similarly if an order that Mr. Hisquierdo pay a portion of benefits once received to Ms. Hisquierdo would be an "assignment", so would a pre-1974 order to pay alimony.

> or equitable process whatever, either before or after receipt by the beneficiary...." (Wissner, supra, at 659).

Thus, it did provide, unlike § 231 m, that the proceeds "shall be exempt from the claims of creditors." Such a provision makes sense, of course, in the context of a life insurance policy; the intent is that a third party not be required to pay off the debts of the insured, through any means. But it would not make sense as to a living person, and was not included in § 231 m.

Also, the provision in Wissner explicitly prohibited "seizure ... before or after receipt by the beneficiary." Thus, the court was quite right in perceiving a "flat conflict" between that language and an order that the beneficiary pay any obligations from the monetary benefits after receipt. Here, there is no such language, and therefore, no prohibition upon a personal order on the railroad worker to pay an obligation after receipt of pension funds.

At any rate, the discussion of the anit-assignment provision in Wissner comes after the conclusion, based on the entirely separate language concerning designation of the beneficiary, that "the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress. It cannot stand." (id., at 659). Thus, the discussion of the anti-attachment statute was not necessary to the result in Wissner, and was not identified as the source of the

strong intent to displace state laws found therein.

For the above stated reasons, the Railroad Retirement Act cannot preempt California community property law regulating the division of community benefits upon dissolution of marriage. There exists no "actual conflict" between the two bodies of law nor is there any express "Congressional mandate" to preempt.

III

PAST AUTHORITY OF THIS COURT, IN WHICH FEDERAL LAWS WERE FOUND TO PREEMPT STATE COMMUNITY PROPERTY LAWS, ARE DISTINGUISHABLE FROM THE PRESENT CASE.

Wissner v. Wissner, supra, and Free v. Bland, 369 U.S. 663 (1962), the two cases principally relied upon by petitioner and by the United States, are both cases in which, unlike here, the federal and state statutes were "in such actual conflict ... that both cannot stand in the area." (Florida Lime and Avocado Growers, supra, 373 U.S., at 141).

In Wissner, the National Service Life Insurance Act provided:

> [The insured] shall have the right to designate the beneficiary or beneficiaries of the insurance [within a designated class], ... and shall ... at all times have the right to change the beneficiary or beneficiaries . . . . 38 U.S.C. § 802 (g). (338 U.S. at 658).

In Free, U.S. savings bonds were issued by the Secretary of Treasury under regulations which provided:

> [T]he co-owner of a savings bond issued in the 'or' form who survives the otner co-owner 'will be recognized as the sole and absolute owner' of the bond, 31 CFR § 315.61, [footnote ommitted] and that '[n]o judicial determination will be recognized which would ... defeat or impair the rights of survivorship conferred by these regulations'. 31 CFR § 315.20, (369 U.S. at 667).

In the disputes over whether the insurance proceeds or savings bonds were community property, the Court pointed to the federal statute and regulations cited above to find that a specific federal rule had been created to govern property rights between individuals: namely insurance proceeds belonged upon death to the named beneficiary, and co-owned bonds belonged to the surviving co-owner. Since the federal rule applying to the situation was clearly stated in the federal statute or regulation, that rule had precedence over any state rule to the contrary.

As the analysis in Part II shows, nothing in the Railroad Reitrement Act states a rule concerning the division, or non-division, of pension benefits upon divorce.

Were there to be a federal rule, therefore, the courts would have to create one -- which is precisely what the United States invites this Court to do with its "need" distinction, and which is precisely what the precedents cited in Part I, supra, caution against. 30/

Furthermore, the preemption of state community property laws in Wissner and in Free, was found necessary because the laws interfered with legitimate exercise of federal powers to further a national interest. In Wissner, the court noted that a liberal policy toward the serviceman and his named beneficiary was evidenced by the comprehensive statutory plan (338 U.S. at 658), and stressed that the statutory purpose involved "the congressional powers over national defense." (338 U.S. at 661).

Similarly, in Free, the success of the management of the national debt was found to depend "to a significant measure upon the success of the sale of savings

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30/ Creating a federal rule here to govern division of property upon divorce would involve precisely the untoward consequences of disturbing a complex system of relationships otherwise governed by state law warned against in Yazell, supra. For, as explained earlier, (pgs. 26-28, supra) state community property law would presumably continue to operate upon these same benefits in other respects, with possible untoward circumstances not readily foreseeable.

bonds. The Treasury in an effort to make the bonds attractive to savers and investors, introduced the survivorship provisions as "a convenient method of avoiding complicated probate proceedings." (369 U.S. at 669).

Thus in Wissner a national interest based on federal warpower, and in Free an interest based upon the federal treasury, were furthered by finding preemption pursuant to the Supremacy Clause. No similar national interest pertains to the division of Railroad Retirement benefits upon divorce so as to preclude state community property laws from operating; as Part II, supra, indicates, the existence of a railroad retirement system generally is something of a historical accident, and the purported interest in assuring sustenance to the individual employee, while it was a purpose of Congress, is subject to so many individual circumstances, by no means preempted, that preemption as to this one source of diminution of available funds could not cause "major damage if the state law is applied." (Yazell, supra, 382 U.S. at 352).

Finally, Yiatchos v. Yiatchos, 376 U.S. 307 (1964) may substantially undermine the premises of Free v. Bland and, perhaps, of Wissner as well. 31/

31/ From the actual facts of Wissner, recited at 89 Cal. App. 2d 759, it seems plain that if the "fraud" rule of Yiatchos had been applied in that case, fraud would have been found.

In that case, which followed Free by only two years, the Court applied the dicta in Free that "where circumstances manifest fraud or a breach of trust" (Free, 369 U.S. at 670), the otherwise applicable federal rule might give way. In so doing, the Yiatchos court recognized as federal law the Washington rule that a gift of community property is constructive fraud if made without the consent or ratification of the spouse. And in applying this rule, the Court implicitly recognized that the wife did have a community property ownership interest in the bonds; otherwise, there could be no "fraud" in depriving her of that interest without consent or ratification. Also, unless one recognizes such an ownership interest, the Court's suggestion that if the widow's "half of the community estate may be satisfied from property or money other than the bonds, [the co-owner] is entitled to all of the bonds" (376 U.S. at 311) would be without meaning.

Thus, Yiatchos reads Free as not displacing the state law of community property at all, but as simply displacing in some circumstances state law regarding the manner in which that property passes upon death by one spouse -- directly, rather than by will. Yiatchos supports our contention that federal statutes which could affect state family property rules should be construed, where possible, to displace such rules to the minimum degree.

CONCLUSION

For the reasons stated above, the decision of the California Supreme Court should be affirmed.

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